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LEGAL FEES EQUITY ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 1580, S. 1794, and S. 1795

OCTOBER 8 AND 29, 1985

Serial No. J-99-64

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S521-53

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LEGAL FEES EQUITY ACT

TUESDAY, OCTOBER 8, 1985

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:30 a.m., in room SD-628, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond (chairman of the full committee), Simon, and Grassley.

Staff present: Randall Rader, chief counsel and staff director, and Louis Westley, minority counsel (Senator Simon).

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. We are happy to welcome everybody up to our Judiciary hearing this morning. We consider it to be a very important hearing.

In 1974, the Supreme Court declared that Federal courts have no authority, in the absence of a statute, to shift a prevailing plaintiff's attorney fees to the defendant. That was the case of *Alyeska Pipeline Service Co.* v. *Wilderness Society* (421 U.S. 240). The *Alyeska* case thus restates the 188-year-old American rule that, in the absence of a different statutory rule, each litigant pays his own attorney. Since then, however, Congress has enacted 129 fee-shifting statutes. Few of the fee awards under these laws are as large as the $2,204,534.99 granted in a single case in 1980 in *Keith* v. *Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980). Nonetheless the availability of lucrative awards has produced a veritable landslide of litigation. In 1980 alone, the Supreme Court issued nine opinions concerning court-awarded attorney fees. That same year, the fifth circuit decided over 50 fee cases.

The Supreme Court has reacted with disfavor to this explosion of litigation. The Court commented in 1983 that fees litigation is "one of the least socially productive types of litigation imaginable." Four Justices have argued that litigation over attorney fees "serves no one's civil rights, and exacerbates the myriad problems of crowded appellate dockets." (*Hensley* v. *Eckerhart*, 103 S. Ct. 1933 (1983).) In a recent case where 186 hours were devoted to resolution of the merits and over 350 hours to the fees issues, the seventh circuit lamented that "the (attorney fees) tail is wagging the (civil rights) dog." (*Mills* v. *Eltra Corp.*, 633 F. 2d 760, 761 (1981).)

One of the main problems is that these fee-shifting statutes contain only sketchy standards for setting "reasonable" fees. The operative language of these statutes consists of 24 words: "* * * The Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Judges are left to create widely varying rules governing eligibility for and the amount of legal expenses shifted to Federal, States, or local governments.

Not only has the sparsity of standards for fee awards clogged the courts, it has also led to exorbitant windfalls for lawyers. Some courts have even employed "multipliers" or "bonuses" to double or even triple an attorney's customary hourly rate when computing a fee award. In response to one recent example where an attorney requested $331,441 in fees at an effective hourly rate of $412.50, the Washington Post editorialized:

> It reveals elements of a gigantic ripoff * * * lawyers—even civil rights lawyers—need at least as much wage restraint as others when it comes to billing the government. [Dec. 16, 1983, p. A22].

In other cases, a judgment of $1 on a $200,000 claim gave rise to thousands of dollars in legal fees; a judgment of just over $2,000 resulted in a fee award of over $45,000. In many cases, the amount of fee awards is simply not proportionate to the degree of success.

Another problem with attorney fee policies is the obvious incongruency and inequity between these Federal fee-shifting statutes and the Criminal Justice Act. Under the Criminal Justice Act, lawyers who defend indigent criminal suspects have received the same set rates—$60 an hour for out-of-court time and $30 an hour for in court time—since 1970. Ironically, attorneys whose job it is to assert the rights and defenses of indigent criminal defendants are often subsidizing the Government while attorneys who choose to assert the rights of suing plaintiffs are often subsidized by the Government.

In 188 years, Congress has yet to undertake a comprehensive overview of attorney fee policies. This stems largely from the smooth and efficient operation of the American rule. This rule has prevented litigants from being penalized for merely prosecuting or defending a lawsuit, has allocated attorney resources to the most meritorious cases, and has ensured that attorneys are responsible solely to their client. Since 1974, however, the American rule has been eroded by a multiplication of statutory exceptions and broad judicial interpretation of the vague terms of such laws. The American rule is being repealed piecemeal. Accordingly, I commend the Reagan administration, particularly the Justice Department and the Office of Management and Budget, for addressing the attorney fee question comprehensively.

The Legal Fees Equity Act, S. 1580, establishes uniform standards for setting fees in both civil and criminal cases sufficient to attract competent counsel without granting windfalls to lawyers. No one questions that attorneys deserve adequate compensation for bringing or defending certain cases against governments, but standards are necessary to ensure those fees remain reasonable. Thus, S. 1580 offers Congress an overdue opportunity to review comprehensively attorney fee policies.

[Text of S. 1580 follows:]

II

99TH CONGRESS
1ST SESSION

S. 1580

To provide for comprehensive reforms and to achieve greater equity in the compensation of attorneys pursuant to Federal statute in civil and administrative proceedings in which the United States, or a State or local government, is a party.

IN THE SENATE OF THE UNITED STATES

AUGUST 1 (legislative day, JULY 16), 1985

Mr. THURMOND (for himself, Mr. HATCH, Mr. DENTON, and Mr. EAST) (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To provide for comprehensive reforms and to achieve greater equity in the compensation of attorneys pursuant to Federal statute in civil and administrative proceedings in which the United States, or a State or local government, is a party.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Legal Fees Equity Act".

FINDINGS AND PURPOSES

SEC. 2. (a) Congress hereby finds and declares that—

(1) Many Federal statutes authorize awards of attorneys' fees to be made to parties who prevail against

the United States, or against State or local governments, in judicial and administrative proceedings;

(2) The failure to provide standards to guide courts and administrative bodies in awarding such fees has led to inconsistent interpretations of these Federal civil fee-shifting statutes, and in many instances to excessive awards of attorneys' fees under them;

(3) It is inappropriate for the Federal Government to impose on State and local governments the statutory requirement to pay awards of attorneys' fees without providing standards by which to make such awards;

(4) The limitation of $75 per hour prescribed by Congress for civil judicial and administrative proceedings under the Equal Access to Justice Act provides a reasonable and appropriate maximum hourly rate for the award of attorneys' fees against the United States, or against State or local governments, in judicial or administrative proceedings;

(5) It is inappropriate for awards of attorneys' fees to be made to parties who have not prevailed on the merits of their complaint against the United States, or against State or local governments, in judicial or administrative proceedings;

(6) It is appropriate that parties in judicial or administrative proceedings against the United States, or

against State or local governments, pay a reasonable portion of their attorneys' fees when monetary awards are recovered;

(7) Statutory provisions are necessary to control the circumstances and conditions under which awards of attorneys' fees and related expenses or costs may be made against the United States, or against State or local governments, in judicial or administrative proceedings; and

(8) Statutory amendments are also appropriate to limit the circumstances in which Federal agencies hire outside private counsel from litigation and the amounts at which such outside counsel can be paid.

(b) It is the purpose of this Act—

(1) To establish a uniform hourly rate that shall be the maximum compensation authorized to be awarded against the United States, or against State or local governments, in judicial or administrative proceedings to which any Federal fee-shifting statute applies;

(2) To require that awards of attorneys' fees against the United States, or against State or local governments, in judicial or administrative proceedings to which any Federal fee-shifting statute applies be made only to parties who have prevailed in the proceedings;

(3) To prescribe standards for the awarding of attorneys' fees and related expenses or costs against the United States, or against State or local governments, in judicial or administrative proceedings to which any Federal fee-shifting statute applies; and

(4) To authorize the Attorney General to promulgate regulations governing the circumstances in which Federal agencies can retain outside private counsel for litigation and to impose a uniform limit on the rates such counsel can be paid from appropriated funds.

DEFINITIONS

SEC. 3. For the purpose of this Act—

(1) "Attorneys' fees" means fees attributable to professional legal services performed by a person, or persons, licensed to practice law (but shall not include services by pro se claimants), or to services by enrolled tax practitioners with respect to proceedings before the United States Tax Court, including overhead expenses, as defined in this Act, but does not including related expenses;

(2) "Fee-shifting statute" means any Federal statute that provides for recovery by a party of attorneys' fees or related expenses against the United States, or against a State or local government;

(3) "Overhead expenses", except in extraordinary circumstances, shall include, but not be limited to, rent

or mortgage payments, maintenance (including heating and cooling costs), furniture and supplies, reporters, treatises, and other books, secretarial and other clerical and librarian time (including computer word processing expenses), telephone services and calls, and mailing expenses;

(4) "Related expenses" means those expenses that may be awarded pursuant to a Federal law, and which are actually incurred by the attorney in connection with judicial or administrative proceedings, but does not include attorneys' fees or overhead expenses, as defined in this Act, or costs enumerated in section 1920 of title 28, United States Code;

(5) "Party" means, for purposes of judicial proceedings, a party as defined by rule 17 of the Federal Rules of Civil Procedure, or, for purposes of administrative proceedings, a party as defined in section 551(3) of title 5, United States Code;

(6) "Judicial proceeding" means a civil proceeding in any court or under the jurisdiction of a judicial officer, in which a party may by law be awarded attorneys' fees or related expenses;

(7) "Administrative proceeding" means any proceeding, other than a judicial proceeding, in which a

party may by law be awarded attorneys' fees or related expenses;

(8) "Administrative officer" means the official(s) or person(s) authorized by statute or regulation to decide the substantive issues being considered in an administrative proceeding, or the official(s) or person(s) designated by the head of the agency as the administrative officer(s) for the purpose of this Act;

(9) "Prevailed on the merits" means having obtained a final decision in which the party has succeeded on a significant issue or issues in the controversy and obtained significant relief in connection with that issue or issues, and may include, where the party is a defendant in a suit by the government, obtaining the dismissal of the complaint;

(10) "Final decision" means a final judgment by the court, or a final order by an agency, in which a party establishes entitlement to relief on the merits of the claim or claims brought in the proceeding, and includes a judgment or order obtained by a party dismissing the proceeding with prejudice or pursuant to a settlement agreement;

(11) "United States" means the United States, or any agency of the United States, or any official of the United States acting in his or her official capacity;

(12) "State" means any State government, or any agency of the State government, or any official of the State government acting in his or her official capacity, and includes the territories and the District of Columbia; and

(13) "Local government" means any county, city, town, municipality, municipal corporation, school board, special governmental district, or other political subdivision created by a State, or any agency of such entity, or any official of such entity acting in his or her official capacity.

SCOPE AND APPLICATION; RELATIONSHIP TO OTHER LAWS

SEC. 4. (a) The provisions of this Act—

(1) apply to any judicial or administrative proceeding in which an award of attorneys' fees and related expenses is authorized, pursuant to any Federal fee-shifting statute, to be made against the United States, or a State or local government, and

(2) establish minimum criteria and requirements for the award of attorneys' fees and related expenses to which this Act applies.

(b) Notwithstanding any other provision of law, no award of attorneys' fees or related expenses shall be made against the United States, or against State or local governments, in any judicial or administrative proceeding, except as expressly authorized by law (other than this Act), and in accordance with the provisions of this Act. No such award shall exceed the amount determined under the provisions of this Act.

(c)(1) The provisions of any applicable Federal fee-shifting statute that establish criteria or requirements in addition to those provided in this Act for the award of attorneys' fees and related expenses in such proceedings, or that otherwise limit awards of attorneys' fees in such proceedings, shall apply in addition to the provisions of this Act.

(2) Nothing in this Act shall be interpreted to create any right to, or provide any authority for, an award of attorneys' fees or related expenses in any judicial or administrative proceeding.

(d) No award of attorneys' fees or related expenses shall be made under a Federal fee-shifting statute against a party who has intervened to defend the validity of a law or action of the United States, or a State or local government, and who has not been found to have violated a constitutional or statutory right of the party seeking the award.

(e) Awards of attorneys' fees and related expenses otherwise authorized under section 504 of title 5 of the United States Code or section 2412(d) of title 28 of the United States Code (the Equal Access to Justice Act) shall be made in accordance with the provisions of this Act, except that subsections (a)(1), (b)(1)(C), (b)(2)(A), and (c) of section 6 of this Act shall not apply.

(f) The provisions of this Act shall not apply to compensation of attorneys in proceedings under section 3006A of title 18, United States Code.

ALLOWANCE OF ATTORNEYS' FEES

SEC. 5. A party otherwise eligible to receive attorneys' fees and related expenses to which this Act applies must establish that—

(1) the party has prevailed on the merits against the United States, or against a State or local government;

(2) the work for which the award of attorneys' fees and related expenses is sought—

(A) was performed in the judicial or administrative proceeding in connection with issues upon which the party prevailed against the United States or against a State or local government, and

(B) was not excessive, redundant, or otherwise unnecessary to resolve the controversy; and

(3) the application for attorneys' fees and related expenses is made in accordance with sections 6(a) and 7 of this Act.

AMOUNT OF ATTORNEYS' FEES

SEC. 6. (a)(1) No award of attorneys' fees against the United States, or against a State or local government, to which this Act applies shall exceed $75 per hour.

(2) Bonuses or multipliers shall not be used in calculating awards of attorneys' fees.

(b)(1) The court or administrative officer shall reduce or deny accordingly the amount of attorneys' fees and related expenses otherwise allowable if it is found that—

(A) the prevailing party, during the course of the proceeding, engaged in conduct that unreasonably protracted the final resolution of the controversy,

(B) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly salary of the attorney representing the party, or

(C) the time spent and legal services provided were excessive with regard to the nature of the controversy.

(2) The court or administrative officer, in the exercise of discretion, may reduce or deny an award where—

(A) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the monetary result or value of injunctive relief achieved in the proceeding, or

(B) a reduction or denial of the amount of attorneys' fees would otherwise be appropriate under the applicable fee-shifting statute.

(c) Whenever a monetary judgment is awarded in any judicial or administrative proceeding to which a Federal fee-shifting statute applies, a portion of the judgment (but not more than 25 per centum thereof) shall be applied to satisfy the amount of attorneys' fees authorized to be awarded against the United States, or against a State or local government. If the authorized award of attorneys' fees exceeds 25 per centum of the judgment, the excess shall be paid by the United States, or the State or local government. This subsection shall not apply to awards of attorneys' fees pursuant to section 7430 of the Internal Revenue Code.

(d) Section 593(g) of title 28, United States Code, relating to independent counsel investigations, is amended by adding at the end thereof the following new sentence: "Such award shall not exceed $75 per hour.".

TIMELY APPLICATIONS AND PROCEDURES

SEC. 7. (a) In any judicial or administrative proceeding to which this Act applies, a party may seek an award of attorneys' fees and related expenses only within thirty days after a final decision by the court or agency from which no appeal is taken. The party seeking an award of attorneys' fees shall submit to the court or agency such information as may be required by the court or agency.

(b) Courts and agencies shall develop procedures, not inconsistent with this Act, for filing of applications for awards of attorneys' fees, which shall provide guidance as to what information should be required to be submitted pursuant to subsection (a) of this section, when such information should be submitted, and when determinations should be made concerning awards of attorneys' fees and related expenses. In no event shall an award of attorneys' fees and related expenses be made prior to entry of a final decision by the court or agency.

MOOTNESS AND SETTLEMENT DEFENSES

SEC. 8. No award of attorneys' fees and related expenses subject to the provisions of this Act may be made—

(1) where the government demonstrates that—

(A) the claims have become moot due to a change in government policy, and

(B) the pendency of the judicial or administrative proceeding was not a material factor in such change in policy; or

(2) for services performed subsequent to the time a written offer of settlement is made to a party, if the offer is not accepted and a court or administrative officer finds that the relief finally obtained by the party is not more favorable to the party than the offer of settlement.

COMPTROLLER GENERAL REPORT

SEC. 9. The Comptroller General of the United States shall submit on April 1 of each year a report to the President and the Congress on the amount of attorneys' fees and related expenses awarded during the preceding fiscal year against the United States, or against State or local governments, in judicial and administrative proceedings to which this Act applies. The courts and each agency shall provide the Comptroller General with such information as is necessary to comply with the requirements of this section.

LIMITATION ON EMPLOYMENT AND COMPENSATION OF OUTSIDE, PRIVATE COUNSEL

SEC. 10. Section 3106 of title 5, United States Code, is amended to read as follows:

"§ 3106. Employment of attorneys; restrictions

"(a) Except as otherwise authorized by law, the head of an Executive department, military department, or other agency, including an independent agency, board, or commission, may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.

"(b) Notwithstanding any other provision of law—

"(1) an Executive department, military department, or other agency, including an independent agency, board, or commission, shall not retain outside, private counsel for the conduct of judicial or administrative litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, except upon a certification of need by the Attorney General and in accordance with regulations promulgated by the Attorney General; and

"(2) no payment from appropriated funds to such outside, private counsel retained pursuant to subsection (b)(1) shall exceed $75 per hour.

"(c) The Attorney General, after consultation with the Office of Management and Budget, the Office of Personnel Management, and other interested agencies, and upon public notice and comment pursuant to section 553 of this title, shall promulgate regulations implementing this section, including—

"(1) the circumstances, terms, and conditions under which Executive departments, military departments and other agencies, including independent agencies, boards, and commissions, are authorized to employ outside, private counsel to be paid from appropriated funds;

"(2) procedures for the receipt and prompt resolution of applications from any agency for a certification of need by the Attorney General, in a particular case or class of cases, authorizing the retention of outside, private counsel for litigation in circumstances not otherwise permitted under this section; and

"(3) the coordination of the use and availability of the expertise of attorneys within the executive branch of government for litigation.

The regulations authorized by this subsection and the determinations of the Attorney General pursuant to such regulations shall not be subject to judicial review.

"(d) For the purposes of this section, the term "outside, private counsel" means an attorney, firm, legal services organization, or association engaged in the practice of law other than as an employee of the United States.

"(e) This section does not apply to the employment and payment of counsel under section 1037 of title 10.".

EFFECTIVE DATE

SEC. 11. The provisions of this Act shall apply to any award of attorneys' fees and related expenses incurred subsequent to the enactment of this Act, including those incurred after such date in actions commenced prior to such enactment.

Senator HATCH. I will turn at this time to my good colleague, Senator Simon.

OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. I am here, really, to learn. I share the chairman's concern that we have far too much litigation. I like the idea of having an overview to see if there are not practical ways to finance legal service without resorting to litigation.

I have two questions on the bill itself. First is a $75 an hour limitation, fair to someone who is a real expert? We pay a physician $2,250 for removing cataracts in an operation that takes less than an hour. How do we compensate a lawyer with a similiar level of experience and skill?

A second concern is with the 25-percent reduction in the amount of the fee impact on the aggrieved party. I like the chairman's idea of having an overview of current policy. I would really like to see us come up with some answers that may differ appreciably from the legislation before us. I want to find alternatives other than courts of record where people can receive equitable treatment.

Mr. Chairman, that is my statement. I defer to you. You are facing two nonlawyers in the Judiciary Committee.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. For my part, I wish you would not remind the Justice Department. For your part, I do not care. [Laughter.]

Before we go to you, Mr. Jensen, I would like to make a short statement.

As you know, I sponsored the Equal Access to Justice Act in this Congress, which passed 95 to 2 on July 24. When the President signed this legislation on August 5, the EAJA was made a permanent regulatory reform. The EAJA allows small businesses and individuals who prevail in civil suits to recover litigation expenses from the Government, unless the Government can prove that its position was substantially justified, or that special circumstances make an award unjust.

It is a law that has worked well and has worked at minimal cost to the Government. We have seen positive proof that Government agencies think twice before bringing an unjustified enforcement action against a small business or an individual. In addition, private parties of limited means now have a permanent alternative to capitulation when faced with arbitrary Government action.

One of the reasons why the EAJA has not "broken the bank" in terms of attorney fee costs is that the rate at which prevailing parties are paid is set at $75 per hour. This rate is subject to only limited adjustment. S. 1580 incorporates this $75 per hour limit. I believe this is a good feature of the bill.

At the same time, S. 1580 astutely recognizes other key features of EAJA cases by exempting the EAJA from any "finding" requirement that the time spent on the case is proportionate to the nature of the controversy or the value of the relief achieved.

Mr. Chairman, I am pleased that Congress was able to pass part of last year's proposal in this area, which doubled the attorney fee rates for cases under the Criminal Justice Act. But the fact remains that a cottage industry of lawyers can make a living suing the Government.

A real threat remains that attorney fee awards cases will continue to expose governments—Federal, State, and local—to monstrous amounts of liability. Attorney fee award litigation—lawyers arguing against each other over what their fee should be—has to be the least socially useful type of litigation there can be.

Mr. Chairman, I look forward to reviewing the record of these hearings in the hope that we can somehow fairly set fee criteria and reduce the threat of budget-busting litigation, particularly against State and local governments.

Mr. Chairman, I would like to add one more point. There also has been some question about the standard for the award of attorney fees to prevailing defendants. To that issue, I would like to include, for the record, a memorandum written by Mr. Edwin Ronwin, an attorney in Urbandale, IA. The memo details Mr. Ronwin's personal experience with prevailing defendant's attorney fees under 42 U.S.C. 1988. I ask that it be included in the hearing record at an appropriate place.

Senator HATCH. Without objection, so ordered.

[Information follows:]

CONCERN ABOUT 42 U.S.C. SECTION 1988, AS AMENDED

By EDWARD RONWIN, Attorney at Law (Iowa)

Attached is a more detailed discussion of the dangers to enforcement of civil rights and the problems which have resulted from the 1976 amendment to 42 U.S.C. Sec. 1988 permitting an award of attorney's fees to the "prevailing party" in civil rights actions under the [Reconstruction] Civil Rights Acts.

The content of the attached may be summarized as follows:

1. The House and Senate both agreed upon the phrase "prevailing party," in the language of the amendment to Sec. 1988; rather than use the term, "prevailing plaintiff" as urged by the Justice Department. Since amending 1988, some of the Justice Department's fears that a "chilling effect" on civil rights would result have come to be.

2. A major United States Supreme Court decision, Christiansburg Garment Co. v. EEOC,(cited in the attached) erected standards for the award of attorney's fees in civil rights actions; but,

(a) The Court looked to legislative history on 42 U.S.C. Sec. 2000e-5(k) and on 42 U.S.C. Sec. 2000a-3(b), which statutes are virtually identical with Sec. 1988, as amended, and which history was described by the Court as "sparse." At the time the Court was looking at said histories, the House and Senate Reports on Sec. 1988, as amended, had been published and would have provided the Court with significant background upon which to frame its decision. Unfortunately, the Court was apparently totally unaware of the House and Senate Reports on Sec. 1988, as amended, when composing Christiansburg.

(b) The effort at setting "standards" has failed with resultant injustice. Worse, the failure raises a substantial threat to civil rights enforcement and, in essence, defeats the alleged purpose for amending Sec. 1988. While not total, the enforcement of civil rights will tend toward becoming a prerogative of the wealthy.

(c) One court boasted that, "After several years of flux (during which we may assume injustices have certainly occurred), rules on liability for attorney's fees are becoming stabile..In contrast, the rules on calculation of attorney's fees have remained unsettled.." That Court's optimism is unjustified. One federal court has recently stated that if the plaintiff were unable to prove the validity or "colorability" of one of its allegations, it would be subject to an attorney's fee award against it. The standards or rules for liability are no more stabile then the method for calculating attorney's fees awards.

3. Both the House and Senate Reports on Sec. 1988, as amended make clear that the "bad faith" of the plaintiff is the only basis upon which to award attorney's fees to a prevailing defendant; however, Christiansburg and its progeny have resulted in no fewer than a dozen terms, such as "frivolous," "vexatious," spurious," "malicious," etc.--all subject to variant definitions and interpretations--becoming bases for awarding attorney's fees to prevailing defendants. As above, one court clearing holds that the plaintiff must prove his case to avoid attorney's fees. In effect, Sec. 1988, as amended, requires citizens to risk a tax on their efforts to enforce a judicial remedy for the violation of their civil rights. Moreover, the amounts awarded as attorney's fees may be a lawyers' godsend, but are profane in the extreme.

4. Not touched upon in the attached, but as important, are various judicial standards and decisions, as well as statutes, whose combined effect has been a denial of civil rights to citizens and amount to a license to state judicial authorities to ignore the demands of the federal constitution.

5. Several cases are discussed in the attached including the author's astonishing experiences in his efforts to right the denial of his civil rights. Considerations of space forbid a full and complete exposition of the author's case and considerations of time have prevented the author from making a more complete survey of cases in which Sec. 1988, as amended, has featured. However, the author's case alone raises many questions about the constitutionality and propriety of the present manner of application and of the wording of Sec. 1988, as amended.

In Conclusion, the author asks the House and Senate Judiciary Committees to hear him out in full both on Sec. 1988, as amended, and on the particularly critical problem of judicial nullification of an important aspect of 42 U.S.C. Secs. 1983, 1985 and 1986, with consequent denial of civil rights to citizens.

Edward Ronwin

The problem of concern had its genesis in the 1976 Amendment of 42 U.S.C. Sec. 1988, which permits federal district courts to award "...the prevailing party..." a reasonable attorneys' fee in actions to enforce, inter alia, the [Reconstruction Era] Civil Rights Acts, 42 U.S.C. Secs. 1981-1983, 1985, 1986. Both the House Report, No. 94-1558, pp. 2-3 and the Senate Report, No. 94-1011 agree that the Amendment was a remedy to Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612 (1975), which, with slight exception, barred attorneys' fees in all cases, including civil rights actions, without statutory authority.

Both the House Report, p. 6 and the Senate Report, p. 4, subscribe to the standard that, "..a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'..."

As to prevailing defendants, the House Report, p. 6, records the warning of the Justice Department that the phrase, "prevailing party" would have a "chilling effect" on civil rights plaintiffs and that the Justice Department favored the term, "prevailing plaintiff."

While recognizing the danger sounded by the Justice Department, both the House and Senate opted for the "prevailing party" rather than "prevailing plaintiff" language. The House Report states the position as follows, p. 7:

> "..to avoid the potential 'chilling effect' noted by the Justice Department and to advance the public interest articulated by the Supreme Court, however, the courts have developed another test for awarding fees to prevailing defendants. Under the case law, such an award may be made only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely 'to harass or embarass' the defendant. United States Steel Corp. v. United States, supra at 364. If the plaintiff is 'motivated by malice and vindictiveness,' then the court may award counsel fees to the prevailing defendant. Carrion v. Yeshiva University, 535 F.2d 722 (2nd Cir. 1976). Thus if the action is not brought in bad faith, such fees should not be allowed. See, Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975); see also Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D.La. 1971), aff'd without published opinion, 468 F.2d 951 (5th Cir. 1972). This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes." (emphasis added).

and the Senate's version is, Senate Report, p. 5:

> "Such 'private attorneys general' should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. Richardson v. Hotel Corporation of America, 332 F. Supp. 519 (E.D.La. 1971), aff'd., 468 F.2d 951 (5th Cir. 1972). (A fee award to a defendant's employer, was held unjustified where a claim of racial discrimination, though meritless, was made in good faith.) Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. United States Steel Corp. v. United States, 385 F. Supp. 346 (W.D.Pa. 1974), aff'd 9 E.P.D. Para. 10,225 (3rd Cir. 1975). This bill thus deters frivolous suits by authorizing an award of attorney's fees against a party shown to have litigated in 'bad faith' under the guise of attempting to enforce the Federal rights created by the statutes listed in S.2278."

It is clear that both branches of Congress equate words such as, "vexatious," "frivolous," malice," "harassment" with "bad faith;" and, while that may be technically erroneous from a legal standpoint, Congress believed that the only basis for awarding attorneys' fees to prevailing defendants was "bad faith" on the plaintiff's part.

In Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), the Court sought to answer the question: "[U]nder what circumstances an attorney's fee should be allowed when the defendant is the prevailing party in a Title VII action?" 434 U.S. at 414; 98 S.Ct. at 696; but, the Court actually addressed the entire question of attorneys' fees in civil rights actions. The particular statute involved in Christiansburg was Sec. 706(k) of Title VII, 42 U.S.C., Sec. 2000e-5(k). In so far as the court is given discretion to award attorneys' fees to the "prevailing party," that statute is identical to 42 U.S.C. Sec. 1988, as amended in 1976. Since its promulgation, Christiansburg has been the guiding star in virtually all civil rights cases on the question of entitlement to attorneys' fees.

The Christiansburg Court reaffirmed its earlier posture, announced in Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), wherein Sec. 204(b) of Title II, 42 U.S.C. Sec. 2000a-3(b), which is virtually identical to Sec. 706(k), was examined; and subsequently announced with respect to Sec. 706(k) in Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); and, in agreement with the view in the House and Senate Reports, supra, that, 434 U.S. at 416-417, 98 S.Ct. at 698:

> "..It can thus be taken as established, as the parties in this case both acknowledge, that under Sec. 706(k) of Title VII a prevailing plaintiff ordinarily is to be awarded attorney's fees in all but special circumstances."

As to prevailing defendants, Christiansburg concludes, 434 U.S. at 421, 98 S.Ct. at 700:

> "..in sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."

and, in slight twist of the language, the Court reiterated its holding which has become a common quotation in subsequent cases, 434 U.S. at 422, 98 S.Ct. at 701:

> "Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense."

In arriving at the above-quoted conclusion, the Court in Christiansburg relied on the following points; and, in the process formulated non-sequiturs and committed an extraordinary omission:

1. The Court held that neither the defendant's demand for a literal reading of 42 U.S.C., Sec. 2000e-5(k)(i.e., same standing for defendants as for plaintiffs); nor, the plaintiff's insistence that a prevailing defendant was entitled to attorney's fees only on a showing of "bad faith" by the plaintiff, were correct, 434 U.S. at 417-418, 98 S.Ct. at 698-699. The Court's view which, in effect, opts for a less stringent standard than "bad faith" by a plaintiff as the only condition for allowing an award of attorney's fees to a prevailing defendant is at odds with the House Report's and the Senate Report's concept as quoted above.

2. The Court argued that since, 434 U.S. at 418-19, 98 S.Ct. at 699:

> "..as emphasized so forcefully in Piggie Park, the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority'..

and, "..when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law."

then, "As the Court of Appeals clearly perceived, 'these policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant.' 550 F.2d at 951. A successful defendant seeking counsel fees under Sec. 706(k) must rely on quite different equitable considerations."

3. The Court speculated that, 434 U.S. at 419-420, 98 S.Ct. at 699:

> "But if the company's position is untenable, the Commission's argument also misses the mark. It seems clear, in short, that in enacting Sec. 706(k) Congress did not intend to permit the award of attorney's fees to a prevailing defendant only in a situation where the plaintiff was motivated by bad faith in bringing the action."

As support for that comment the Court looked to the legislative history of Sec. 706(k), which the Court found to be "sparse," and about which the Court said, 434 U.S. at 420, 98 S.Ct. at 699:

> "The only specific reference to Sec. 706(k) in the legislative debates indicates that the fee provision was included to 'make it easier for a plaintiff of limited means to bring a meritorious suit.'"

Certainly what the Court found in the legislative history of Sec. 706(k) does not support the conclusion that "Congress did not intend to permit the award of attorney's fees to a prevailing defendant only in a situation where plaintiff was motivated by bad faith.." Christiansburg, supra, 434 U.S. at 419-420, 98 S.Ct. 699. The conclusion is also at odds with the above-quoted passages from the House and Senate Reports.

However, the Court went further afield in its search for Congressional meaning and reviewed the legislative history of the virtually identical provision of Title II, upon which the Court observed, 434 U.S. at 420, 98 S.Ct. at 699, 700:

> "During the Senate floor discussions of the almost identical attorney's fee provision of Title II, however, several Senators explained that its allowance of awards to defendants would serve 'to deter the bringing of lawsuits without foundation,' 'to discourage frivolous suits,' and 'to diminish the likelihood of unjustified suits being brought.' If anything can be gleaned from these fragments of legislative history, it is that while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis. The Court of Appeals for the District of Columbia Circuit seems to have drawn the maximum significance from the Senate debates when it concluded:
>
> > '[From these debates] two purposes for Sec. 706(k) emerge. First, Congress desired to 'make it easier for a plaintiff of limited means to bring a meritorious suit'..But second, and equally important Congress intended to 'deter the bringing of lawsuits without foundation' by providing that the 'prevailing party'--be it plaintiff or defendant--could obtain legal fees.' Grubbs v. Butz, 179 U.S. App., D.C. 18, 20, 548 F.2d 973, 975.'"

The conclusion in Christiansburg based on the few comments in the Senate debates on Sec. 204(b) of Title II, is poorly supported and, in view of the House and Senate Reports, quoted above, highly questionable.

The Court proffered two additional agruments to buttress its contention that Congress intended a lesser standard than "bad faith" for allowing attorney's fees to defendants. One argument is the Court's belief that, 434 U.S. at 419-420, 98 S.Ct. at 699:

> "As pointed out in Piggie Park, if that had been the intent of Congress, no statutory provision would have been necessary, for it has long been established that even under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bad faith."

Actually, in Piggie Park, the statement was made with respect to a plaintiff's right to obtain attorney's fees and not with respect to a defendant's right, Christiansburg, 434 U.S. at 417, 98 S.Ct. at 698.

However, the purpose for awarding attorney's fees to prevailing plaintiffs under amended Sec. 1988 was to rectify the problem caused by Alyeska, House Report, p.2,3 ;Senate Report, p. 1. As to prevailing defendants, Congress could easily have intended that the "bad faith" standard be applicable and merely encoded what the American (judicial) rule has always allowed. Certainly, as to Sec. 1988, that appears to be the case.

The other argument to which the Court looked for support of its "lesser than bad faith" view, was expressed as follows, 434 U.S. at 419, 98 S.Ct. at 699:

> "Furthermore, while it was certainly the policy of Congress that Title VII plaintiffs should vindicate 'a policy that

> Congress considered of the highest priority.,' Piggie Park, 390 U.S. at 402, 88 S.Ct. at 966, it is equally certain that Congress entrusted the ultimate effectuation of that policy to the adversary judicial process, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402. A fair adversary process presupposes both a vigorous prosecution and a vigorous defense. It cannot be lightly assumed that in enacting Sec. 706(k), Congress intended to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith."

However, the above-quoted attempt at justification for the Court's conclusion makes no sense in view of the fact that, as admitted in Christiansburg, some statutes, 434 U.S. at 415-416, 98 S.Ct. at 697:

> "..make fee awards mandatory for prevailing plaintiffs; others make awards permissive but limit them to certain parties, usually prevailing plaintiffs.."

In formulating Christiansburg, the Court committed an unusual oversight. Christiansburg was formulated in January, 1978, more than a year after the passage of amended Sec. 1988. Moreover, the legislative history of Sec. 706(k) was admittedly "sparse," Christiansburg, 434 U.S. at 420, 98 S.Ct. at 699, and, as quoted above from the case, the legislative history of the virtually identical provision of Title II is equally sparse. Nevertheless, and despite the availability of the House and Senate Reports on amended Sec. 1988 and the policy inherent in the text of Christiansburg that the analogous provisions on attorney's fees in civil rights cases [Sec. 706(k) of Title VII and Sec. 204(b) of Title II] be interpreted identically; as is also the policy of Congress and a purpose of amended Sec. 1988, House Report, p. 1, Senate Report, p. 1, the Court in Christiansburg totally ignored, or was oblivious to amended Sec. 1988 and to the above-cited House and Senate Reports.

Had the Court in Christiansburg referred to the House and Senate Reports on amended Sec. 1988, the Court could not have concluded other than, as argued herein, that Congress was equating terms such as "frivolous,""groundless," etc., to "bad faith" or to the absence of "good faith" on the part of the plaintiff as the standard for allowing attorney's fees to prevailing defendants in civil rights cases.

Moreover, the Court's logic in Christiansburg has led to a host of terms which have appeared in federal decisions in civil rights cases describing a plaintiff's behavior or the quality of his cause which can trigger the allowance of attorney's fees to a prevailing defendant, to-wit: "frivolous," "unreasonable," "groundless," "continuence of litigation after clearly 'frivolous,' 'groundless,'" "without foundation," "wanton," "oppressive," "malice", "harassment," "vindictiveness," "meritless,""vexatious," "absence of good faith," and "bad faith." Virtually all of these terms have been judicially defined, and while in some contexts they may equate to "bad faith," they need not necessarily do so. For example the "frivolous" has been lucidly defined in Blair v. People of State of California, 340 F.2d 741, 742 (9Cir.1965):

> "But an application for a writ of habeas corpous is not frivolous merely because it is determined to be without merit as a matter of law. It is frivolous only if the applicant can make no rational argument on the law or facts in support of his claim for relief."

On the other hand, "bad faith" is Spiegel v. Beacon Participations, Inc., 297 Mass. 398, 416, 8 N.E. 2d 895, 907:

> "..a general and somewhat indefinite term. It has no constricted meaning. It cannot be defined with exactness. It is not simply bad judgment, it is not merely negligence. It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of intent or ill will. It partakes of the nature of a fraud...It means 'with actual intent to mislead or deceive another'..."

Although "frivolous" has been equated to "bad faith", U.S.F.&G.Co. v. Woodward, 118 Ga. App. 591, 164 S.E.2d 878, 881 (1968), it is quite possible to erect a "frivolous" claim or defense without an element of "bad faith." The claims or defenses may appear to others as "without a rational basis"; yet, the view may be held in complete "good faith," i.e., the absence of, or antonym of, "bad faith," Detenber v. American Universal Ins. Co., 372 F.2d 50, 53 (6 Cir. 1967).

Christiansburg's lesser standard than "bad faith" (or the absence of "good faith") as a determinent in the award of attorney's fees to prevailing defendants in civil rights actions, which, in addition to being contrary to Congressional will, as quoted above, has given rise to a jumble of words and phrases which often have multiple, judicial meanings, and has led to interpretative convulsions.

The author has reviewed a small number of the federal cases dealing with amended Sec. 1988. Several blatant examples of the abuse of judicial discretion to the detriment of civil rights plaintiffs have already appeared:

1. In Bowers v. Kraft Foods Corp., 467 F. Supp. 971 (E.D. Mo. 1979), the Court spoke as follows, p. 974:

> "2. This Court finds that the plaintiff has not proved a prima facie case and that defendant has convincingly demonstrated that the plaintiff's work performance, her attitude, and her work record were not satisfactory. The defendant has successfully rebutted any allegations of the plaintiff."

The Court also characterized Bower's law suit as "a frivolous lawsuit maliciously filed," p. 974.

Kraft Foods asked for $14,500 in attorney's fees; Bowers had asked for $13,125 in attorney's fees (467 F.Supp. at 974). The Court awarded Kraft Foods $5,000 in legal fees. Yet, Bowers, who was apparently no longer employed by Kraft and may have been out of work was earning $800 a month as her last salary level at Kraft Foods, after approximately eight (8) years of employment. The records of Bower's salary increases were given by the Court as follows (Bowers started at $400 a month in August, 1970), 467 F.Supp. at 974:

"Effective date of Increase	Salary(per month)
January 17, 1972	$435
November 6, 1972	$475
July 16, 1973	$515
May 20, 1974	$560
July 29, 1974	$585
June 30, 1975	$625
October 4, 1976	$675
December 19, 1977	$735
September 25, 1978	$800

In reading the brief decision of the district court, it is apparent that Bowers, a black person, may have had a tendency to impart racial overtones to any criticism or action by others which did not please her; but, there was certainly nothing beyond rationality; ie., "frivolous," Blair,supra, 340 F.2d at 742, in her action. Even her steady increases would tend to belie "poor performance" in her job--if she was so bad at it, they should have fired her rather than keep increasing her salary at a steady pace. Yet, in a last salary level of $800 per month, the judge slammed Bowers with a tax of $5,000 as attorney's fees for Kraft Foods because Bowers believed that she had a proper civil rights case. How does one whose salary levels are so low pay such an horrendous tax; and one levied because one demands one's civil rights?

The case went to the Eighth Circuit Court of Appeals and became Bowers v. Kraft Foods Co., 606 F.2d 816 (8 Cir.1979) as mod. on denial for rehearing. In its brief decision, the Eighth Circuit held, 606 F.2d at 818:

> "Although we have upheld the judgment of the district court denying Bowers relief, we do not believe that Bowers' contentions were so frivolous or malicious as to justify an award of attorney's fees to Kraft. Bowers' receipt of a right to sue letter, even though insufficient in itself to overcome the district court's findings of frivolity, could have lead Bowers to reasonably believe that her claim was meritorious. Moreover, the evidence, while weak was sufficient to conceivably have influenced Bowers to believe that she has a stronger case."

And, while reversing the award of attorney's fees, Bowers was stuck with her costs on appeal.

The result in Bowers stings the conscience.

The case is a subversion of the discretionary power lodged in district courts under amended Sec. 1988. It is evident from a reading of the trial court and appellate court decisions, that had no attorney's fees been awarded, no appeal would probably have been filed--at least by Bowers. Instead, Bowers, an $800 a month clerk was faced for a time with a $5,000 *tax*, plus her own attorney's fees, plus costs. Eventually, Bowers had to pay *her* own attorney's fees plus trial costs which was proper, but Bowers has also to carry the costs in the appellate court and endure the uncertainty inherent in the appellate process.

As a black woman, who at the time of her suit was, according to the facts in the trial court's decision, about ten years out of high school, it is conceivable that Bowers would encounter some, and possibly significant, racial discrimination at some future time. Yet, with the threat of such huge attorney's fee awards--in comparison with her salary level--as a real prospect should Bowers decide in the future to press a suit for enforcement of what she believes to be a violation of her civil rights, can one seriously believe that Bowers will not be deterred from seeking redress? And, is not the intent of amended Sec. 1988, just as the basic intent of Sec. 706(k) and Sec. 204(b), turned on its head by results such as in *Bowers*?

Suppose Bowers had not received a "right to sue" letter, why would her case have been"frivolous," i.e., without *rational* argument just because Kraft's eight witnesses--all employees of Kraft *undoubtedly* thinking about their own jobs-contradicted Bowers? Yet, the 8th Circuit in the passage quoted above appears to argue that the "right to sue" letter "could have led Bowers to reasonably believe that her claim was meritorious," (hence, it would certainly have a rational basis); yet, the appellate court with some unspoken definition of "frivolous" in mind, asserts that even the "right to sue" letter was "insufficient in itself to overcome the district court's findings of frivolity," which would indicate that the appellate court is using the term "frivolity" in the sense of a"lack" and not as defined by the 9th Circuit in the sense of no rational argument on the law or the facts, *Blair,supra*.

The word, "malicious" was also used by the district court--which did not find "bad faith" and while mentioning the word, "malicious", the appellate court left it dangling in its decision. Thus, the words describing conduct and their meaning vary from court to court. That situation creates a hazard and a serious, even devastating financial trap for the unwary and innocent plaintiff who merely wishes to remedy that he believes to be a violation of his civil (and Constitutional) rights.

The *Bowers* case is one example where in its short life, the *chief* aim of amended Sec. 1988, as of Sec. 706(k) and 204(b) has been *inverted to* the detriment of the enforcement of civil rights.

2. In *Flores v. Moore*, 461 F. Supp. 1104 (N.D.Miss. 1978), the plaintiffs were black, female employees who challenged alleged racial discrimination at a formerly private hospital which had become a publicly owned facility. The supervisory and administrative staff was a carryover from the private ownership period and was all white with a high degree of familial relationships. The district court found that the particular incidents which gave rise to the break between the plaintiffs and the hospital did not reflect racial discrimination. However, the plaintiffs' allegations aimed a general charge of racial discrimination in such phases as "hiring, recruitment, promotion, termination, layoff, intimidation, reprisals and in terms and conditions of employment," 461 F.Supp. at 1111, fn.6, would allow a conclusion that even if not established as true, a rational basis for the action existed when those allegations are reviewed. Thus, the plaintiffs claimed that:

a. "On occasions when federal or state inspectors were due to visit the hospital, Harrellson (a white administrator) would direct them to scatter over the dining room area and not congregate at separate tables, as was their custom," 461 F.Supp. at 1112.

b. While disputed, plaintiffs claimed that:

(i) maids ate at a separate table, 461 F.Supp. at 1112.
(ii)bathrooms were, in fact, segregated, 461 F.Supp. at 1113
(iii) lack of promotion opportunities available to black

employees, 461 F.Supp. at 1113

(iv) segregation according to race of semi-private hospital rooms, 461 F.Supp. at 1113; and rearrangement of patients to mix race when state and federal inspectors were to view the hospital, 461 F.Supp. at 1113.

(v) There was an admission that no black, registered nurse had ever worked at the hospital which the head of nurses attributed to the alleged fact that none had applied, 461 F.Supp. at 1113.

While prior to plaintiffs' suit, EEOC found against the plaintiffs' claims, as to the reason for their termination, the EEOC did conclude, 461 F.Supp. at 1114:

> "..the hospital did maintain racially segregated restroom facilities in violation of Title VII.."

Although the specific basis for the plaintiffs' cessation of employment by the hospital may not have had a direct racial disciminatory animus, it is difficult to argue that the relationships at the hospital, as stated in the decision, do not mirror an indirect, racial discriminatory situation particularly in view of the finding by EEOC that racial segregation did exist in respect of certain facilities. It was not unreasonable for the plaintiffs to believe that any action which the hospital administration took that struck at, or changed their situation, was racially motivated; and, the plaintiffs' attorneys, a Legal Services Corp., surely had a right to seek out elements of indirect discrimination as of direct discrimination. The Judge didn't so believe and it is clear from the decision that, in consequence, the district court awarded defendants attorney's fees to be paid by the plaintiffs' attorneys, the Legal Services Corp., a federal agency.

That EEOC found, racially segregated facilities, should have barred an award to defendants so suspect of violating civil rights even if they prevailed on the hearing of the case.

3. In Goff v. Texas Instruments, Inc., 429 F.Supp. 973 (N.D.Texas 1977), the plaintiff brought his action claiming alleged religious discrimination. Goff, an engineer, at first pro se, then by attorney, apparently did a poor job in advocating his position and, perhaps, in clarifying the essence of his claim. Although, the court found that Goff's claim was "factually baseless, unreasonably brought and unreasonably maintained," the Court asserted that "Goff did not exhibit actual bad faith in the sense that his suit was maliciously filed," 429 F.Supp. at 977. Nevertheless, Goff was taxed $2,500 for attorney's fees to Texas Instruments. The Court does note that, 429 F.Supp. at 977:

> "..At the hearing on attorney's fees, plaintiff's counsel argued that one of Goff's supervisors had stated that he didn't want any more 'damn Jews' working for him."

The Court rejected the statement out-of-hand, 429 F.Supp. at 977; however, if one of Goff's supervisors had actually made the statement, then an award of attorney's fees to Texas Instruments was an outrage.

4. In the recent case of Ramos v. Lamm, 539 F. Supp. 730 (D.Colorado 1982), the Court expressed the following view, p. 734:

> "After several years of flux, rules on liability for attorney's fees are becoming stable. Congress had determined the types of causes of action for which courts may award attorney fees. Standards are beginning to evolve about when a party is entitled to attorney fees under those causes of action.."

and, the Court continued, 539 F.Supp. at 734:

> "In contrast, the rules on calculation of attorney fees have remained unsettled. The appellate opinions on this subject are unclear and frequently contradictory..."

Yet, in the 1982 case of Molgaard v. Town of Caledonia, 539 F. Supp. 571 (E.D.Wisconsin 1982), the term, "spurious" was added to the list of conditions which, if present, allow awards of attorney's fees to prevailing defendants, 539 F. Supp. at 572

And, how many American citizens have suffered during the "several years of flux" and from the "unclear and frequently contradictory" rules on calculation of attorney fees?

5. It is clear from a reading of the decision in Reineman v. Valley View Community School District No. 365-U, 539 F.Supp. 876 (N.D. Ill. 1982), that if the plaintiffs were unable (where they required to litigate the matter which was obviated by the occurrence of another matter in the case) to prove the validity or "colorability" of one of their allegations, the Court would consider attorney's fees taxation against the plaintiffs; yet, the failure to so prove might be meritless but not necessarily irrational, i.e., frivolous. However, the Court did not refer to Christiansburg; rather it equated "meritless" with "groundless or without foundation," which can easily be taken to mean failure to prove one's case. To award attorney's fees on that basis is clearly counter to Congressional intent and to the comments in Christiansburg on "meritless" with respect to attorney's fees awards, 434 U.S. at 421-422, 98 S.Ct. at 700-701.

Reineman carries an even more ominous threat to civil rights which finds expression in the comment that, 539 F.Supp. at 877:

> "..Had Reinemans asserted their claim in the face of well-established adverse precedent, a section 1988 fee award would plainly have been justified."

No matter how well entrenched a legal precept is, a citizen ought to be able to challenge the concept with freedom from the fear of taxation for attorney's fees. For example: at one time, the United States Supreme Court considered "separate but equal" to be the proper constitutional standard. Following, Reineman, civil rights plaintiffs would have been dunned of fortunes in attorney's fees between 1898 when Ferguson v. Plessy was announced and 1954 when Brown v. Board of Education was promulgated.

Reineman is a dangerous perversion of the whole purpose of amended Sec. 1988 and it mocks the assurance in Ramos v. Lamm, quoted above, that "rules on liability for attorney's fees are becoming stable."

6. The size of awards, even for plaintiffs, is becoming astronomical. For example in Ramos v. Lamm, the total attorney's fees award against the defendants was $709,933.50. (plus $32,782.43 in additional costs). In Brewster v. Dukakis, 544 F.Supp. 1069 (D. Mass. 1982), the plaintiffs received an award of $371,162.77 in attorney's fees (plus costs of $15,041.24). In N.Y.State Asso. for Retarded Children v. Carey, 544 F.Supp. 330 (E.D.N.Y. 1982), the total attorney's fees award to the plaintiffs was $1,389,915.91 (and $16,835.48 in other costs).

Cursory view of these and a few other cases indicates that the district courts must be spending considerable time on determinations of such fees with each Court juggling numerous "factors" to arrive at "just" awards. Yet, the federal judiciary continues to complain about how clogged the system is.

Civil rights matters are becoming an attorney's gold mine and it is doubtful whether civil rights would not find equal advocacy if limitations were imposed on the amount of fees. Introduction of greater clarity, simplicity and standardization in the manner by which attorney's fees are determined, particularly when defendants become entitled, would be very beneficial.

The author's case illustrates another blatant abuse of amended Sec. 1988.

The author started law school at age 47, after approximately 20 years of a professional career, and graduated at age 50. During that time a group of hooligans attending the law school went on an anti-semitic rampage and targetted the author to feed their warped sense of "fun." That caused the author much grief and constituted an outrageous interference with the author's right to pursue his goals and caused the author to sue to stop the abuse. The law school Dean's handling of the situation was less than adept (which is par for the academic course); and, the Dean resented the author's criticism on that matter and also due to the author's position on the school's most powerful committee and the author's activities with respect to that committee. (Incidentally those activities were praised by William C. Canby, Jr., who is not a Judge on the U.S. Court of Appeals for the Ninth Circuit).

When the author went to take the Februery, 1974 Arizona Bar examination, the Bar committee chairman required the author to take the examination "conditionally," but two of the seven students that the author had to sue to halt the anti-semitic binge were allowed to take the examination without problem.

In April, 1974, the author was informed that he allegedly failed the examination; however, it appeared that the committee had violated the federal anti-trust laws by the manner of grading (recently, the Ninth Circuit held that, if the author's allegations are proven, then the committee members did violate the federal anti-trust laws, see *Ronwin v. State Bar of Arizona*, 686 F.2d 692 (9th Cir. 1982)); and, the author so told the committee. The author also told the committee that it was discriminatory to allow the two anti-semites who the author had to sue to take the examination without problem while requiring the author to take the examination "conditionally"--which caused the author much conern at a time when the author would have preferred to study for the Bar examination.

In June, 1974, the author passed the Iowa Bar examination and was admitted to the Iowa Bar. In July, 1974, the author applied to retake the Arizona Bar examination. In an affidavit, later repeated at a deposition, the committee chairman alleged that the author was not "mentally and physically able" to practice law because of the author's charge that the committee had violated the federal anti-trust laws and that the committee had discriminated against the author by requiring the author to take the examination "conditionally" while not so impeding the two anti-semites whom the author had sued. A subsequent hearing by a "special committee" was chaired by an anti-semite and was an engineered fraud. During said hearing, 2 psychiatrists (one chosen and paid-for by the Bar) informed the special committee that the author was mentally able, as did twelve practicing attorneys for whom the author had written briefs, as did a law school professor and the law school Dean himself (the latter for reasons of his own since he actually had a hand in the engineering of the fraudulent hearing). The only expert who testified against the author was a psychologist who liberally committed perjury (some examples are attached hereto from a discussion of his testimony taken from a Memorandum of Points and Authorities that the author submitted to the Arizona Supreme Court in August, 1975 and which refers to the psychologist's testimony in the transcript of the hearing before the special committee). Nevertheless, the special committee held the author to be mentally unable to practice law (they conceded that the author was physically able); and, subsequently, the Arizona Supreme Court, despite a third psychiatrist adding his view that the author was mentally able, found the author to be not mentally able. At the same time, said court argued that there was such a thing as a "non-medically recognized mental disease or condition".

In August, 1976, the author reapplied for admission to the Arizona State Bar and the application was summarily denied even though the report of a fourth psychiatrist asserted that the author was mentally able to practice law. In the subsequent years, four more applications were summarily denied, even though a fifth psychiatrist reported to the Arizona Supreme Court that the author is mentally able. In the meantime, the Iowa Supreme Court took up the matter and with the entire record of the Arizona Supreme Court before it to that time, found the author mentally capable in 1977 after an evidentiary hearing.

As a consequence of these utter denials of due process and violation of the Arizona Supreme Court rules on admission, the author took to suing the Arizona Supreme Court members and their agents under 42 U.S.C. Sec. 1983, 1985 and 1986. In each of the five cases brought under the civil rights acts, the District Court has summarily dismissed. In three of the cases the District Court has assessed attorney's fees against me; yet, the Court in each instance had had ample evidence of the blatant denial of due process to me by the defendants named and evidence of fraud and perjury by the defendants or by some of them, and by attorneys representing them. One of the defendants, John P. Frank, who has been chairman (and may still be) of the Commission which recommends nominees for vacancies on the U.S. Court of Appeals for the Ninth Circuit, conducted ex-parte conversations with at least one of the District Court judges and likely with others. In addition he falsely represented to Judge Manuel L. Real of the Central District of California, that the author had ordered deletions from the special committee record, when, the court reporter later identified Mr. Frank as the party who had ordered the deletions. (Judge Real did nothing about the fraud on the Court).

Each case that I brought to the District Court based on the civil rights statutes has been summarily dismissed. Even efforts to have testimony given by some witnesses to show that I state a cause of action were douced. No trial by the juries I have demanded has been allowed. So far, the Ninth Circuit has rubber-stamped the outrages in "Memorandum" (unpublished) decisions.

In one case, the Judge assessed over $5,000 in attorney's fees against me; yet, no finding of "frivolous, unreasonable or without foundation" was made;

compare Christiansburg, 434 U.S. at 422, 98 S.Ct. at 701. In that case, the Judge has sat on a motion for a new trial for over three years. This same Judge made an anti-semitic remark from the bench and tolerated the clear fraud of John P. Frank played on the Court.

In another case, in which two actions were consolidated, the Judge awarded some of the defendants a total $6,500 at a time when my total earnings for that year were in the vicinity of the lower twenty thousand area. Further, no hearing, no opportunity to have witnesses called to give testimony which would establish that I have a cause of action and no finding by the court of "frivolous, etc." was made. In the Ninth Circuit, no oral argument was allowed and they added another $1,000 in attorney's fee award against me for defendants who were not paying their own attorney's fees, but digging into the coffers of the State Bar of Arizona, which was not a defendant. In addition a clear demonstration of double charging by the attorneys for the defendants for 16 alleged hours of work met with no comment by either the District Court or the Court of Appeals. In addition, there was evidence of a close working relationship, sub rosa between the attorneys for the defendants and the District Court Judge and his law clerks.

In essence, the abuse of my civil rights has been twisted into an argument over attorney's fees while I am criminally denied due process because I criticized the bar committee's grading procedures which criticism the Ninth Circuit has recognized as reasonable, 686 F.2d 692.

In December, 1980, the author made his eighth application for admission to the Arizona State Bar. The Arizona Supreme Court allowed the author to take the February, 1982 bar examination, but by then, said Court had still not determined the author's "character and fitness." The author allegedly failed the examination; the author sued, and the District Court has stated that the author has stated a cause of action. The author took the July, 1982 bar examination and passed (that was the author's ninth application). Then, the Arizona Supreme Court demanded that the author submit to further examination by a psychiatrist and a psychologist, which the author did. Result, they joined the five earlier psychiatrists who held the author mentally able. In addition,as part of the Dec. 1980 application, the author submitted a report of one of the earlier psychiatrists who reexamined the author and who concluded that the author was mentally able. Still the Arizona Supreme Court persisted in demanding more from the author. Finally, said Court held a hearing on December 16, 1982, which was a most extraordinary "appellate hearing." To this date (April 27, 1983), said Court has still not ruled on the author's mental ability.

The details are by no means exhausted. There has been official records destroyed and tampered with, agreements violated, perjury, fraud and other nefarious activities.

Amended Sec. 1988 is being terribly misused. Standards are so ill-defined and the discretion of the trial courts so varient that abuse mounts; particularly as to awards to "prevailing defendants," who now regularly ask for attorney's fees even though there is not present any "frivolous, etc." behavior on the plaintiff's part. The amended Sec. 1988 is being used as a club to destroy efforts to obtain remedy for civil rights violations instead of the means to facilitate such efforts. Judges are putting in long hours wrestling with attorney's fees requests which takes good time from serious legal work. Some of the cases, such as Ramos v. Lamm,supra, appear to have absorbed as much or more of the judge's time figuring attorney's fees as expended by the judge in determining the underlying civil rights matters. In essence, the First, Fifth and Fourteenth Amendments are not matters of money, instead of right and justice.

Permitting the district judges to exercise discretion on attorney's fees in civil rights cases is one of the faults; and, correction of "errors" in appellate courts is not always an answer. For one thing appellate action means that the wronged party may have to incur significantly more fees, both attorney's and court costs, and still not have the injustice righted. Some judges are astute, highly honorable men devoted to fair play and justice. Others are not. Federal judges are appointees in which political friendships have significantly contributed to their nominations for the judicial vacancies. Some judges have no special training for judicial work and often showed no special ability as practicing attorneys. Unfortunately, as human beings, they can be swayed by social relationships and past professional associations despite the requirements of the Code of Judicial Ethics. There is really no need for discretion by the judge; particularly, if the "prevailing party" language were replaced and, in the least, replaced by "prevailing plaintiff" phrase.

No citizen should have to enter the federal courtroom seeking enforcement of our most precious rights; i.e., civil rights, under the threat that,despite his view that he has a proper action held in "good faith," he will have to pay the defendant's attorney's fees. That makes civil rights the province for enjoyment by the wealthy and chills enforcement for the poor. That is also contrary to what Congress apparently wanted, House and Senate Reports as quoted above.

It is utterly wrong in a civil rights action to tax a party the attorney's fees of his opponent because the Court, as in the author's cases,without a trial on the merits, concludes that the plaintiff did not have a good case. A plaintiff's bad faith, and bad faith alone, --without qualifying words like, "vexatious," "harassment," "frivolous," etc., should be the only standard where an award of attorney's fees against a plaintiff--"Congress' chosen instrument to enforce our most precious rights," should be permitted.

The author suggests that the attorney's fee provision of amended Sec. 1988, as the similar sections of other civil rights statutes be amended to provide for attorney's fees to prevailing plaintiffs but only to prevailing defendants upon a clear showing of "bad faith" by the plaintiff. Furthermore, persistence by the plaintiff should not be taken as equivalent to "bad faith." The author further suggests that no attorney's fees be allowed to a defendant unless the matter has gone to a trial on the merits. "Trial by summary judgment" and "trial by motion to dismiss" have become all too common as allegedly "sharp" attorneys beguile the bench.

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In the face of the description of APPLICANT's behavior as set forth above, WILLIAMS' efforts to justify his MEMO, already shrouded in inexplicable enigmas and contradiction, infra, became less than credible. Furthermore, any impartial view of WILLIAMS' testimony, supra, forces the conclusion that if anything APPLICANT is most certainly mentally able to practice law.

However, when WILLIAMS had posed to him the sole issue herein in question form, he responded, Deposition, p.59, lines 10-12:

> "...I believe that the only thing I can say in response is that, no, I do not have an opinion about whether Mr. Ronwin is qualified to practice law..."

As a consequence, WILLIAMS has provided SPE. COMM. with absolutely no clear and convincing evidence to support its finding and, if anything, has provided a considerable volume of testimony to the contrary.

9. ENOS

a. Contradictions

ENOS is the only witness for SPE. COMM. to whom one can initially attribute an expertise in the area of human mental analysis; although ENOS is not a medical doctor. However, ENOS' testimony is riddled with contradiction and improper practice. Additionally, ENOS changed his opinion on the sole issue in question herein and did so pursuant to a process which the record clearly demonstrates to have been a subornation of this witness by DAUGHTON; and said subornation was accomplished, in part, by the unilateral breaking of a stipulation between APPLICANT and SPE. COMM.

Proceeding first to the contraditions in ENOS' testimony, the record provides numerous examples, some of which are set out below:

Belatedly analyzing PEDRICK's deposition, ENOS observed PEDRICK's comment that, (R.T., p.301, line 25 to p. 302, line 1):

> "On page 36 (of PEDRICK's Deposition), now we are talking about 'He (APPLICANT) was subjected to a most extraordinary campaign of harassment or hazing.' " (Parenthetical information supplied.)

ENOS then drew attention to PEDRICK's remarks that he had "many conversations" with APPLICANT about the situation, (R.T., p.302, lines 9-12); following which ENOS treated SPE. COMM. to his expert analysis, (R.T., p.302, lines 12-20):

> "I am looking at the words 'many conversations.' Here is a student beginning to take up an extraordinary amount of time of a dean who is a busy man, who is concerned with a wide variety of activities; but this student is saying that my problems are so important that you, the Dean, have to begin responding to this. So he is going to the Dean so many times that the Dean himself is saying, 'I had many conversations with him about this.' "

Preliminarily, the implication discerned by ENOS is not at all present. PEDRICK's comment is not in the nature of a complaint. It merely states as a fact that "many conversations" were held between APPLICANT and PEDRICK concerning said harrassment. ENOS also informs us that, in effect, the problem need not have concerned the Dean; that, somehow, APPLICANT's behavior was "improper" to have consumed the Dean's time. If PEDRICK did not complain, why should ENOS?

The Court is directed to the sample of said harrassment in evidence herein II.D., supra. It is submitted that anti-semitism at LAW SCHOOL was a more than proper subject to entertain PEDRICK's very serious time and attention.

Furthermore, one would assume that as ENOS considers that APPLICANT took "too much" time, ENOS would be able to express a view on what would be a "proper" amount of time. To that end, FRANK queried ENOS, (R.T., p.309, lines 9-26):

> "Q But now I am asking you - - you

> have made a judgment, you have expressed a judgment a moment ago, I believe, that Dr. Ronwin troubled the administration with these matters more than the normal number of times. Is that what you were saying?
>
> A Antisematic matters.
>
> Q Of the matters of the attacks on him. That's what those references are to, aren't they?
>
> A Yes.
>
> Q That means you have some conception of how often a normal person would take up such matters with a university. What is that conception?
>
> A I have no idea.
>
> Q So that in other words you say that Dr. Ronwin took the matter up too often but you don't know how many times would be a sensible number?
>
> A That's what it sounds like, yes, sir.
> (Emphasis supplied.)

Clearly, ENOS is simply looking to fault APPLICANT, and if contradiction or absurdity is necessary to "accomplish" the objective, ENOS will employ them.

ENOS wrote his report, Exhibit 9 to R.T., in a vein which unmistakeably reads as though APPLICANT was hallucinating when being interviewed by ENOS, see for example p.2 of said report as well as virtually every other of its eleven pages.

On p.2 of said report, ENOS attempts to report what APPLICANT told him about APPLICANT's efforts to change the class schedule at LAW SCHOOL and, ENOS falsely states that APPLICANT's purpose was solely a desire "...For needed coffee time..." and that APPLICANT, in effect, ordered PEDRICK to change said schedules and that APPLICANT told ENOS, in effect, that PEDRICK simply jumped up and dutifully obeyed. ENOS also comes forth with the analysis, for which he provides no evidence, that APPLICANT "...did not seem able to appreciate the point of view of the others involved..." The actual, pertinent passages (p.2, Exhibit 9 to

R. T.), follow:

> "It is apparent that Dr. Ronwin is very verbal. He said in school he found that he was doing a lot of talking and felt he was not doing enough studying. Hence, when he had an opportunity in a committee, he suggested that the Law School change its schedule of classes so that people like him would have more time for needed coffee in the morning but that Dean Pedrick was against changing the schedule. According to Dr. Ronwin's narrative, Dr. Ronwin confronted Dean Pedrick. "After I explained it, he said (now quoting Dean Pedrick) 'change the schedule,' and ran out." "After that he made statements against me stating that 'he rubs me wrong'." Dr. Ronwin said that he wrote these statements down right after the meetings with Dr. Pedrick and had them in his notes.
>
> The examiner at this point was developing the impression that Dr. Ronwin at times had tremendous feelings of omnipotence. For example, when Dr. Ronwin was pushing to change the students' class schedules, he was only seeing the problem from his own personal frame of reference and assumed that this was the primary frame from which to work. He did not seem able to appreciate the point of view of the others involved. He seemed to be saying that the inability of the others to see the problem of the class schedules from his point of view was due to a deficit in them."

ENOS' testimony before SPE. COMM. was in similar vein, (R.T., p.152, line 3 to p.153, line 6) and he admitted he weighed it against APPLICANT, (R.T., p.196, line 11 to p.197, line 4), regardless of whether or not APPLICANT's suggestion was reasonable, (R.T., p.198, line 12 to p.199, line 3).

However, the fact is that the suggestion for class schedule change was accepted and was not advanced by APPLICANT to "get more coffee", but to improve the opportunity at LAW SCHOOL for all students, including APPLICANT, to pursue their studies; and, the effort represented but one among many exerted by APPLICANT, without remuneration and at the expense of APPLICANT's time, to upgrade procedures at LAW SCHOOL.

This Court need not accept APPLICANT's word as proof. Rather, the affidavit of Professor Canby, Exhibit 11 to R.T., who was the Chairman of the Curriculum Committee at said school, fully attests to APPLICANT's preceding assertions and, at the same time, exposes the hollowness of ENOS' "expert" analysis. Thus, CANBY avers, Exhibit 11 to R.T.:

> "Mr. Ronwin was the most diligent member of the committee. He made several proposals and often documented them in writing. At lease one of the proposals, concerning the scheduling of first and second year classes, was adopted after debate and vote by the committee, followed by a vote of the full faculty.
>
> Mr. Ronwin urged his positions with vigor and frequently there was disagreement with them. On those occasions when he did not succeed in achieving adoption of his entire proposal, he sometimes succeeded in influencing the compromise result ultimately reached by the committee. Judging from his entire performance as a member of the Curriculum Committee that year, I would characterize him as an effective member of the committee."

PEDRICK, too, recognized APPLICANT's efforts (Exhibit 15 to R.T., p.36, lines 24-25):

> "...he had a lot of ideas. Actually some of his ideas were ultimately adopted..."

In one breath, ENOS asserts "expertly", that as APPLICANT has moved frequently, (R.T., p.200, lines 6-9):

> "...Job hopping like this is usually not the sign of a highly productive research person who becomes involved in a project, gets things going around him."

Shortly thereafter, shown APPLICANT's list of published researches, Exhibit 12 to R.T., ENOS "expertly" declares, (R.T., p.208, lines 24-26):

> "I can say that the man has put in an awful lot of work to get these amount of publications done, yes, sir."

In connection with the Minnesota Multiphasic Profile Index (MMPI) test, ENOS was less than candid with APPLICANT.

APPLICANT's objections to said examination are twofold: (1) A number of questions are direct inquiries into religious values which are not proper areas of governmental inquiry, Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900, 904, (1940); Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 1683, 1684, (1961); and Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702, 707 (1971). (2) Most of the questions do not permit an honest "true" or "false" response which is the only response called for on the MMPI. Even more objectionable is the use of "mostly true" or "mostly false", as suggested by ENOS, since these are ill-defined quantums.

Examples of the type of questions found on the MMPI in the first category, supra, are, (R.T., p.183, lines 6-25):

> "Q BY MR. FRANK: I direct your attention to question 58, "Everything is turning out just like the prophets of the Bible said it would."
>
> 95, "I go to church almost every week."
>
> 98, "I believe in the second coming of Christ."
>
> 483, "Christ performed miracles such as changing water into wine."
>
> 490, "I read in the Bible several times a week."
>
> 249, "I believe there is a devil and a hell in afterlife."
>
> 258, "I believe there is a God."
>
> Those are all questions in the examination?
>
> A Yes.
>
> Q There are a number of others I haven't mentioned which relate to matters of religious conviction and religious points of view, isn't that so?
>
> A I believe so, yes. "

For elucidation of the problem at the root of APPLICANT's second objection, supra, testimony by BARNES, with whom APPLICANT discussed the matter, is on point, (R.T., p.244, line

12 to p.245, line 1):

> "Q Probably not alone in that. I'm trying to figure out what the secret would be in answering question 7, which asks, 'My hands and feet are usually warm enough.'
>
> A That's a good one, and I went through a number of these questions with Dr. Ronwin and asked him, "Why won't you answer this question?"
>
> He said -- well, I have quoted it here. I will paraphrase it. He said basically, 'You are talking to a scientist. When you are talking to me, and this question does not make it clear to me whether you are talking about my hands being flushed or just differing from the ambiant or external temperature, when you ask me a question of this sort you have to be more precise. Otherwise I won't answer it.' "

On presenting similar objections to ENOS, during the period of his examination, APPLICANT was informed by ENOS to answer only those questions APPLICANT believed he could. No other qualification, warning or notice accompanied ENOS' directive. Thus ENOS admits in his report, Exhibit 9 to R.T., p.4, bottom:

> "The examiner pointed out that there were a lot of questions on this test but that Dr. Ronwin was to feel free to answer those questions that he could answer comfortably and to skip those that he could not." (Emphasis added.)

Before SPE. COMM., ENOS reacknowledged the directions he had given, (R.T., p.147, lines 3-4):

> "I told him any questions he did not feel like answering, to skip it." (Emphasis added.)

In subsequent testimony, it transpired that a failure to answer more than thirty (30) questions was interpreted against the examinee; as ENOS admitted, (R.T., p.186, lines 15-18 and p. 186, line 25 to p.187, line 2):

> "Q If you skip more than 30 questions, does it affect the outcome of the test?

> A Then you begin to suspect the capacity of the man to handle a test like this.
>
> * * * * * *
>
> Q You begin to find unfortunate personality traits, if there are more than 30?
>
> A We begin to suspect the man is having problems, yes, sir." (Emphasis supplied.)

Had ENOS informed APPLICANT, as in good faith he should have, of the "30 questions skip limit", APPLICANT would have not even attempted to take said examination and insisted upon the calling in of some other psychologist not so firmly wedded to MMPI, of whom there are several in this community.

The testimony of GRAY, III.D.1.b., *infra*, (and that of TUCHLER, III.D.1.c., *infra*) shows that MMPI is not necessary for human mental analysis, (R.T., p.274, lines 7-13 and lines 22-26).

Lastly, the "30 questions skip limit" poses a serious problem for one who interposes objections on constitutional grounds as did APPLICANT. This is well shown by the following exchange, (R.T., p.187, lines 3-16):

> "Q Approximately how many questions are there in here that have some religious content?
>
> A I don't know.
>
> Q There are somewhere between 10 and 20 at least, aren't there?
>
> A Could be.
>
> Q So the fact of the matter is that in the use of this test, if we are going to draw some negative implication or some conclusion about a personality trait from a failure to answer 30 of them, a pretty sizable block of that 30 gets racked up on religious questions, doesn't it?
>
> A If you say there are 20 or 30, it would be two-thirds of it.

ENOS' failure to inform APPLICANT of the "30 questions skip limit" and, worse, his direction to skip *any* questions that APPLICANT believed he could not answer comfortably, was an unconscionable and unethical form of entrapment designed to impute suspicion on APPLICANT's mental status.

The record contains other questionable activities by ENOS and contradictions, infra, which cast an indisputable pale upon his "expertise". These matters arise in connection with his subornation by DAUGHTON.

b. The Subornation of ENOS

ENOS admits he was provided with information about APPLICANT, dehors his examination of APPLICANT, by DAUGHTON, (R.T. p.189, lines 1-12):

> "Q The passage in the report, Exhibit 9, your report, says that 'from the initial information provided by Mr. Daughton it appears that this man had been having severe personality clashes over a considerable period of time,' and what I want to find out is with some provision where you got the business about severe personality clashes?
>
> A This may have been my conclusion rather than Mr. Daughton's statement.
>
> Q It is your conclusion based on what Mr. Daughton told you?
>
> A Yes."

It is obvious that DAUGHTON's pre-examination information was designed to influence ENOS toward a negative conclusion on APPLICANT.

Nevertheless, ENOS clearly announced in his report, Exhibit 9 to R.T., p.10, first paragraph:

> "The question as to whether or not Dr. Ronwin is 'mentally able to engage in active and continuous practice of law' in the State of Arizona has been raised. This examiner does not purport to be able to answer that question.'" (Emphasis added.)

APPLICANT's attention to DAUGHTON's pre-examination activities to influence ENOS' decision was first focused on APPLICANT's reading of ENOS' report; however, no objection was raised to DAUGHTON's activities since ENOS' conclusion with respect to the sole issue herein, supra, was noncommittal and of no account.

However, in testimony before SPE. COMM. it proved that DAUGHTON continued his covert activities designed to influence and change ENOS' "expert" conclusion, as revealed in the following dialogue between DAUGHTON and ENOS, (R.T., p. 163, lines 9-16):

> "Q At the time that you had concluded these two clinical interviews and the psychological testing, did you then prepare a written report which has been admitted in evidence as Exhibit 9?
>
> A Yes.
>
> Q Have you since that time reviewed additional materials which I have furnished you?
>
> A Yes, I have. (Emphasis supplied.)

A recitation of the list of materials furnished ENOS then followed, (R.T., p.163, line 24 to p.164, line 18) and from that listing only the deposition of SPE. COMM.'s witnesses were provided to ENOS. It also proved that the deposition of PEDRICK, which is essentially quite favorable to APPLICANT and which was available at the time and which is in evidence herein, (Exhibit 15 to R.T.) was not provided to ENOS at the same time, (R.T., p. 191, lines 22-25):

> "Q Were you given the deposition of Dean Pedrick, the Dean of the law school, which was taken in connection with this very same matter by Mr. Daughton?
>
> A No, sir."

ENOS admitted that the provision of PEDRICK's deposition could have altered ENOS' conclusion (R.T., p.192, lines 6-24).

Despite the fact that DAUGHTON later apologized to SPEC. COMM. for not providing PEDRICK's deposition, (R.T., p.213, lines 8-10), DAUGHTON's denial of the process as an effort by him to sway ENOS, (R.T., p.165-b, lines 4-7) rings hollow, especially when it is considered with the fact that DAUGHTON's activities were covert in both instances and in violation of a stipulation as expressed by FRANK, (R.T., p. 165, line 7 to p.165-a, line 9):

> "MR. FRANK: Objection. I would like to put this objection on the record, please, Mr. Chairman. Object to interrogating this witness in respect to these materials. *The situation is that we stipulated that this witness was to be tested by Dr. Enos. We had no agreement as to anything else whatsoever.*
>
> *The stipulation was that the test materials were to be passed on to Dr. Barnes or to a psychiatrist of my own choosing. In this case I now discover in this room for the first time that the counsel for the Committee has given this witness all sorts of other additional materials which he regards as useful from his point of view.* I object to that having been done. *I object to our not having been informed. I object to the fact that we at no point were given any indication we might provide other materials if this was to be done. This is obviously heavily weighted now in favor of what amounts, to the prosecution's point of view, were important on this subject.*
>
> I object. This is totally improper. Object to any inquiries beyond the report which has been made. We have a report of a psychologist based on his tests. That I have joined in putting in evidence. He gave tests; he came to conclusions. We agreed that this should be done. We have no agreement of this sort, *and I object that the witness is being mischanneled by this highly selective presentation of material."* (Emphasis added throughout above.)

And, FRANK elaborated further, (R.T., p.165-a, line 21 to p.165-b, line 2):

> "MR. FRANK: My problem is, Mr. Chairman, this witness is being given only the prosecution's case; he is not being given any of the materials which come in here, which have begun to come in, and which will come in through tomorrow, which if he had them before him might cause his opinion to go in a different direction. *I think this is truly good (must be an error) faith or serious abuse of the stipulation we made."* (Emphasis and parenthetical note added.)

It is more than obvious that impropriety seriously afflicts the testimony of ENOS and that he is a suborned witness.

Shortly following the above and in an effort to mitigate the impropriety, DAUGHTON advanced the question and ENOS denied that the materials had any effect on his subsequent change of testimony, vis à vis the sole issue in question herein, wherein ENOS asserted indirectly that APPLICANT is not mentally able, (R.T., p.174, line 3 to p.175, line 9). Thus, the transcript records, (R.T., p.165-b, line 26 to p.166, line 8):

> "Q BY MR. DAUGHTON: Did those additional materials have any significance in your opinion so far as your overall evaluation of Edward Ronwin?
>
> A I seriously consider every bit of information that I am privileged to look at, but it did not change my basic opinion and my basic discoveries. It gave additional material to support my diagnosis. I saw nothing in there that would contraindicate (sic) the diagnosis I had formulated on November 19th." (Emphasis added.)

However, in direct contradiction of the denial, quoted above, that the material provided surreptitiously by DAUGHTON had any effect on his change of conclusion, supra, ENOS testified, (R.T., p.190, lines 13-19):

> "Q In short, it is the materials which you were given which carry you over and make it possible for you to form the opinion which you have expressed, is that correct? Without those materials, you couldn't do it?
>
> A I think that is a fair statement, yes, sir." (Emphasis added.)

Did the materials help ENOS to reverse his conclusion or didn't they? ENOS has two stories and they contradict each other.

Further evidence of subornation occurred subsequent to SPE. COMM. hearing. By chance, ENOS and APPLICANT were in FRYS FOOD STORE located at McClintock and Southern in Tempe, around 8:00 p.m. on March 19, 1975. ENOS approached APPLICANT and asked APPLICANT how APPLICANT was doing.

APPLICANT: "Not so well thanks to you (ENOS)."

ENOS: "Did you take the exam?"

> APPLICANT: "Of course not."
>
> ENOS: I thought they were going to let you take the exam but hold you up a few months."

That theory could only have been provided to ENOS by DAUGHTON and it was the reassurance contained in it, that ENOS would not be harming APPLICANT, which helped ENOS to feel comfortable with his change of "expert" conclusion.

APPLICANT has attempted to obtain an affidavit from ENOS of his statement. ENOS refuses to give one. ENOS has admitted the fact of the meeting in FRYS to BARNES, but now denies that he made the statement.

ENOS' contradictions and, indeed, falsehoods, coupled with DAUGHTON's contributions, supra, show that ENOS' "expertise" is tarnished and questionable; that ENOS is a suborned and perjured witness; that stipulations were violated; that, in fact, ENOS' function was only to pass his examination results on to BARNES and/or other psychiatrists who might be called in. ENOS' testimony cannot be taken as clear and convincing evidence on the sole issue in this cause and, in fact, must be discarded as improperly obtained.

B. Material Evidence Allegedly "Adverse" to APPLICANT

1. The CK Memoranda

CK wrote two memoranda: Exhibit 2C to R.T., dated October 26, 1972, addressed to APPLICANT and Exhibit 2B to R.T., dated May 15, 1973, addressed to MATHESON. As acknowledged in MAY-15 MEMO, (p.2, Third paragraph, line 5), a copy of OCT-26 MEMO was attached by CK to MAY-15 MEMO. MAY-15 MEMO is derogatory of APPLICANT; it is also false. For example:

a. On page 1, second paragraph, line 10 of MAY-15 MEMO, CK wrote:

> "...I found the paper to be of extremely poor quality, showing indeed very little research (as proved, for instance, by the

* * * * * * *

Senator HATCH. Thank you, Senator.

We are very proud to welcome to the committee——

Senator SIMON. I will have to leave very shortly, and if I could go out of order I would simply add, that the National Law Journal says, the two largest government users of outside counsel, the FSLIC, and the Federal Home Loan Bank Board, are exempt from this particular bill. I would be interested in your response as to why they are exempt.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator Simon.

The first witness the subcommittee is proud to welcome is the Deputy Attorney General of the United States, Lowell Jensen. We want to commend you for the outstanding service that you have rendered to the Department.

We will take your testimony at this time.

STATEMENT OF D. LOWELL JENSEN, DEPUTY ATTORNEY GENERAL, OFFICE OF THE U.S. ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. JENSEN. Thank you, Mr. Chairman and members of the committee. I am pleased to appear here today in support of this very important issue. I have testimony that has been prepared, and I am going to abridge that and ask that my testimony that has been submitted be entered into the record.

Senator HATCH. Without objection, we will do that for all witnesses. We would like to limit all witnesses to 10 minutes.

Mr. JENSEN. Thank you, Mr. Chairman.

I am pleased to appear today in support of S. 1580, a bill To provide comprehensive reforms and to achieve greater equity in the compensation of attorneys pursuant to Federal statute in civil and administrative proceedings in which the United States, or a State or local government, is a party.

The Department of Justice has proposed this bill to bring some much needed rationality to the system for awarding attorneys' fees–paid for by the taxpayer—under the numerous attorneys' fee statutes enacted by Congress.

According to a recent survey, Congress has enacted some 131 statutes providing for the award of attorneys' fees to parties in litigation before the courts or before administrative agencies. A significant percentage of these statutes allows private parties to recover attorneys' fees from the Federal Government or from the States.

In all such enactments, Congress has altered the traditional American rule that each party to litigation bears its own legal expenses, greatly expanding the circumstances in which the Federal Government and the State and local governments are held liable for the legal expenses of the opposing private parties in litigation. Indeed, the recently re-enacted Equal Access to Justice Act, codified at 28 U.S.C. 5504 and 2412(d), provides for the award of attorneys' fees to any prevailing party who meets certain eligibility requirements unless the Federal Government can show that its position in the litigation was substantially justified.

These so-called fee-shifting statutes were each enacted in response to important concerns. They reflect the judgment of Congress that a departure from the American rule is appropriate to enable indigent parties, small businesses, victims of discrimination, and others to attract competent counsel to vindicate meritorious claims. We believe that ensuring the availability of competent counsel to enforce the rights of those who may not otherwise be able to afford representation is a praiseworthy objective. The worthiness of the goals sought to be achieved by most fee-shifting statutes cannot be doubted.

Support for these goals, however, should not blind us to equally valid concerns about the financial strain these statutes impose on the public treasury, or to the ever-increasing burdens they place on the judicial system. For example, with the notable exception of the Equal Access to Justice Act, these fee-shifting statutes provide courts only rudimentary standards and principles for the award of attorneys' fees and afford no viable checks on escalating fee demands. As a result, as I describe below, the cases awarding attorneys' fees are frequently marked by a confusion over the proper bases for fee awards, a waste of judicial resources in determining the proper award and, in many instances, inordinately high fee awards. As Professor Berger so aptly observed, "The only truly consistent thread that runs throughout Federal court decisions on attorneys' fees is their almost complete inconsistency."

The Department of Justice naturally has a considerable interest in the award of statutory attorneys' fees. This Department represents Federal Government agencies in most of the enforcement suits brought by the Government; and it defends the great majority of suits brought against the Government by private plaintiffs. In addition, the Department of Justice is the principal Federal agency monitoring the court system.

We believe that at least part of the confusion manifest in the attorneys' fees area is due to the almost total lack of coordinated consideration of the various civil fee-shifting statutes—in relation to each other and to the Criminal Justice Act attorneys' fee provisions. This has gone on long enough. It is now time for issues relating to Government compensation of private attorneys to be addressed on a comprehensive and coordinated basis.

I. THE PURPOSE OF REFORM

Perhaps the best analogy supporting the need for attorneys' fee reform is the Federal Government's experience in providing medical care to the aged and needy. Through the Medicare and Medicaid Programs, the Government has undertaken to provide adequate medical and health care to millions of citizens. Through long experience, however, Congress and the health care agencies have found that, no matter how worthy the general goal, the system to be effective and efficient must be structured to prevent excessive cost and to avoid creating incentives for needless medical procedures. There must be adequate mechanisms to ensure that health care providers are not paid unreasonably high fees or compensated for treatment that is unnecessary. The legislation of recent years abandoning a cost-based system of compensation and substituting a fixed prospective payment system has reined in some of the excesses of the past and provided more rational incentives to hold down medical costs.

Thus, under the new Medicare procedures, hospitals are limited to specified charges for their work, and can no longer chair their "going rate," no matter how high. Patients are entitled to medical care, but not without regard to the cost.

We similarly need to reevaluate the current method of awarding statutory attorneys' fees. Just as in the medical area, the purpose of such attention is not to deprive deserving claimants of adequate legal representation. Instead, we must work to ensure that the purposes of these attorneys' fees statutes are properly carried out by protecting taxpayers from having to foot the bill for exorbitant legal fees or unnecessary litigation. Like unnecessary medical procedures which benefit no one but the doctor or hospital, unnecessary litigation benefits no one but the lawyer. And just as the medical payment system can be restructured to deter excessive medical procedures and provide incentives to hold down costs, Federal fee-shifting statutes can be adjusted to prevent excessive fees and to provide incentives to hold down costs.

Another analogy is presented by the Criminal Justice Act, 18 U.S.C. 3006A, which provides for the payment of counsel appointed to represent indigent defendants. Although those defendants are faced with the loss of their liberty through conviction and incarceration, and often seek vindication of various constitutional rights related to their case, the CJA has never adopted a "prevailing market rate" approach for the compensation of counsel. The payment rates have been strictly limited by law—recently raised to $60 per hour for in-court time and $40 per hour for other time, subject to various per-case limits. The limitation of attorneys' fees in these cases has never been thought to be inconsistent with society's interest in providing counsel to indigents to vindicate their rights.

The rules for civil fee-shifting statutes, however, heretofore have been governed by markedly different principles, principles that often serve to encourage excessive fee awards and a multiplication of litigation both on the merits of questionable claims and over the amount of the fees in cases where the plaintiff does prevail. The benefit to the nominal plaintiff all too often is overshadowed by the secondary issue of attorneys' fees.

II. PROBLEMS WITH CIVIL FEE-SHIFTING STATUTES

Upon examination, we find that three different types of difficulties typically occur in the administration of the various Federal fee-shifting statutes. First, and perhaps most obvious, is the increasing incidence of inordinately high attorneys' fees awards through the use of high hourly rates, multipliers, and other means. Second, and somewhat related to the first, is the great disparity in awards that seems at times to border on the irrational. Third, and increasingly noticed by judges and commentators, is the growing burden on the courts and the litigants imposed by a system in which the rules are unclear and parties are encouraged to engage in expensive litigation of attorneys' fees issues rather than to enter into prompt and inexpensive settlement agreements. Finally, though much of the Department's immediate attention focuses on the effect of Federal fee-shifting statutes, the States and local governments are experiencing these problems on even a larger scale—because their scope of potential liability is greater and because attorneys' fee awards can pose a much greater burden on the public treasuries of local governments.

In our experience, courts frequently have either interpreted fee-shifting statutes inconsistently or reached inappropriate results. For example, courts have awarded fees to parties far in excess of the relief obtained on the merits. In addition, attorneys' fees are generally based on the "prevailing market rate" for legal services in the community. See *Blum* v. *Stenson,* 104 S. Ct. 1541, 1545–47 (1984) (nonprofit legal services attorneys awarded fees based on prevailing market rates for corporate law firms). In practice, this often means that the hourly rates awarded are as high as those charged by silk stocking corporate law firms, rather than on a fee that is sufficient to attract competent counsel. The prevailing rate in high-priced markets like the District of Columbia often reflects the highly specialized nature of the legal practice in that market.

Thus, taxpayers often end up compensating attorneys for basic legal work at rates lawyers charge large corporate clients for their special skills and expertise in complex legal matters. The use of a "prevailing rate" system to calculate fee awards often produces awards that increasingly bear little relationship to the actual cost necessary to make legal representation available to parties in litigation.

Again, drawing on the analogy to medical services, this would be like compensating all doctors for routine medical procedures on the basis of rates charged by Dr. Denton Cooley. A Washington Post editorial (December 16, 1983, at 22, col. 1) explained succinctly why it is inappropriate to require the Government to bear the same high hourly rates that corporate law firms may demand from their clients:

> Just because well-heeled private clients dole out huge sums does not mean that the public should be equally generous. The prevailing wage approach that government uses when it is buying services . . . has a superficial appeal. But on closer inspection it reveals elements of a gigantic ripoff.

In practice, as that editorial suggests, the trend in attorneys' fee awards may be to make publicly financed fee awards even more generous than fees charged in private practice. Because the constraints that normally apply in private practice—discussion and negotiation of the fees with the client—are absent in the fee-shifting context (see *Blum* v. *Stenson,* 104 S. Ct. at 1547 n.11), attorneys are given the incentive to ask for ever-increasing hourly rates. Indeed, it is now not uncommon for attorneys to be awarded fees that even exceed the hourly rates that the attorneys seeking fees normally would charge their private clients.

In addition to overcompensating lawyers for basic legal work, the use of a prevailing rate system often subsidizes large firms that use pro bono cases to train their younger, less experienced lawyers. As Judge Gerhard Gesell of the District Court here in Washington recently wrote:

> It is now accepted that lawyers who prevail in—Equal Access to Justice Act—cases may be entitled to be paid a reasonable fee for services which are still somewhat euphemistically referred to as pro bono. Attorneys hope to receive and usually

> request massive fees which cover their time, overhead, out-of-pocket expenses and a handsome profit. Often the government is asked to pay for the learning experiences of coveys of junior associates and other assistants assigned to a case to break the tedium of everyday practice. The concept of merely making lawyers whole has long since gone out the window. As yet, courts have had little success in fashioning tools for dealing with this burgeoning phenomenon.
>
> * * * Lawyers who treat the EAJA as designed to compensate counsel in the same generous manner as some lawyers are compensated in private practice should take heed of the consequences. In passing this statute Congress clearly indicated that it did not intend to place such a heavy burden on the public purse. Failure to reach prompt and reasonable fee dispositions by settlement or efficient use of court proceedings may eventually jeopardize the golden goose. Congress, for its part, would do well to consider how the fee-setting process may be streamlined, perhaps through use of arbitration or promulgation of more definitive and simplified standards for passing on such fee requests.

As the initial three-judge panel in *Copeland* v. *Marshall*, 594 F. 2d 244, 257 n.75 (D.C. Cir. 1978), stated:

> It is not our intent to establish a subclass of fees payable for title VII litigation or to relegate, in any way, the vincition of title VII rights to second-class status. To do so, obviously, would run counter to the very purpose for which title VII was enacted * * * But it is our intent to resist the imposition on the public sector of the highest standards of legal remuneration adopted in the private sector—standards which are out of line with the ethic of public service with which attorneys are encouraged to engage in public interest litigation, and which may even risk turning the public against the very provisions for the award of attorneys' fees on which appellees rely in this case.

We have also found that some courts have used bonuses and multipliers to increase the base fee award—sometimes doubling or even tripling the hourly rates. Indeed, based upon cases reported in the past several years for which we have been able to gather information, we estimate that the use of upward adjustments or multiplication factors to increase the reasonable hourly rate has increased the amount that Government was required to pay in attorneys' fees by an average of 43 percent at the Federal level, and by 41 percent at the State and local level.

We do not believe that bonuses and multipliers should be used to increase the hourly rate that the court has already determined to be reasonable. Several different rationales have been offered for the use of bonuses and multipliers—including the novelty and complexity of the issues, the high quality of representation, and delays in payment. However, every lawyer must confront these considerations in the ordinary course of litigation. The quality of representation should be reflected in the hourly billing rate; the novelty and complexity of issues should be reflected in the hours reasonably expended. For these reasons, the Supreme Court's decision in *Blum* v. *Stenson*, 104 S. Ct. at 1548–49, generally ruled out multipliers based upon such factors.

Another factor often mentioned as a basis for awarding a bonus is to cover the risk of not prevailing in a case. Though the Supreme Court has not yet addressed this issue squarely (see *Blum* v. *Stenson*, 104 S. Ct. at 1550 n.17), we also believe that the risk of not prevailing is always part of any litigation. To award multipliers based upon a contingency factor clearly would be inconsistent with the spirit and intent of the various Federal fee-shifting statutes, each of which provides for the award of fees only to a party who achieves some specific degree of success on the merits. As the Federal court of appeals here in Washington recently observed:

> Awarding an upward adjustment to the lodestar for the risk of losing and the concomitant risk of not obtaining an award of attorneys' fees is not unlike compensating an attorney for unsuccessful claims; it hedges the statute's requirement that only prevailing parties may recover attorneys' fees.

We oppose any such evasion of the statutory demands of eligibility for attorneys' fees. In fact, augmenting the fee award when the chances of recovery are least could have the perverse effect of penalizing most those parties whose conduct is least blameworthy.

In enacting the various fee-shifting statutes, Congress has attempted to increase access to counsel, not to "create a * * * fee bank to be liberally drawn upon by lawyers for their own welfare." In practice, however, high hourly rates combined with bonuses and multipliers only encourage unmeritorious litigation. The system has clearly gone awry when, as is now often the case, litigation is driven by the prospect of high fee award and not by the merits of an individual case. As Judge Wilkey observed in dissent in *Copeland* v. *Marshall*, 641 F. 2d 880, 920, (D.C. Cir. 1980) (en banc) (emphasis in original):

> Eliminating the barrier of attorney's fees encourages plaintiffs to assert their legal and civil rights.
>
> * * * But encouraging injured plaintiffs is a goal distinct from that of encouraging lawyers with the lure of attorneys' fee bonanzas. The majority's philosophy appears to be solicitous of the sellers of legal services beyond the needs of the buyers of these services.

The need for corrective legislation is heightened by the fact that, under present law, Federal litigators may be powerless to limit fee award to reasonable levels. For example, since *Laffey* v. *Northwest Airlines, Inc.*, 746 F. 2d 4 (D.C. Cir. 1984), the D.C. circuit has repeatedly chastised Government attorneys for refusing to settle fee applications without contest for more than $75 per hour for partners and $60 per hour for associates.

Finally, cases awarding overly generous compensation to private attorneys also contrast sharply with the strictly limited salaries paid to attorneys who represent the Government. As one court observed in a leading case, fee-shifting statutes are not intended "to make the private attorney general's position so lucrative as to redicule the public attorney general." When retaining private counsel—for example, to represent individual Federal employees in the *Bivens* cases—the Department of Justice's Civil Division successfully limits the billing rates to no more than $75 per hour. Moreover, when the Government itself is awarded attorneys' fees by law—for example, in frivolous tax litigation—the Department relies upon average hourly rates—based on actual cost—ranging from approximately $30 for junior attorneys to approximately $60 for the most senior.

The situation under fee-shifting statutes is startlingly different. In one case that attracted considerable publicity (see New York Times, December 14, 1983, at A22, col. 1), a law professor petitioned for an award of $332,441—at a billing rate of $275 per hour plus a multiplier of 50 percent, for an effective rate of $412.50—after he had successfully urged the Supreme Court to strike down a Massachusetts law that allowed churches and schools to veto liquor licenses for neighboring businesses. Though incurring little of the overhead expenses of attorneys in private practice, he argued that this rate was reasonable because comparable practitioners in the community charged similar rates and he had charged even higher rates to his private clients. The district court awarded the full hourly rate of $275, but denied the requested 50 percent multiplier, prompting the Washington Post to editorialize (December 16, 1983, at A22, col. 1) that the State had been asked to pay "a hefty fee for a moonlighting academic who wins a liquor license case." Ultimately, the court of appeals reduced the rate to $175 per hour—still a rather sizable fee by any standard. *Grendel's Den, Inc.* v. *Larkin*, 749 F. 2d 945, 956 (1st Cir. 1984).

In addition, fee issues increasingly overshadow the case on the merits and deplete valuable judicial resources. See *Ashton* v. *Pierce*, 580 F. Supp. 440, 444 (D.D.C. 1984) ("Often these fee requests consume more court time and involve more paperwork than the underlying case".)

The issue of attorneys' fees has become such a big ticket item in many cases that lawmakers now retain their own counsel to handle such issues. Indeed, some law firms have long advertised their specialization in the recovery of attorneys' fees under Federal statutes. (See, e.g., Legal Times, August 1982, at 14.) There are even special treatises and reporters devoted entirely to the issue of attorneys' fees. (See, e.g., M. Derfner and A. Wolf, Court Awarded Attorney Fees (1983); Attorney Fee Award Reporter.)

Moreover, detailed factual showings may be necessary to justify hourly rates, for example, requiring discovery and evidentiary proceedings in some cases. The district court in *Laffey* v. *Northwest Airlines, Inc.*, 572 F. Supp. 354, 389 (D.D.C. 1983), complained of "attorneys who, in their fervor to produce a thorough fee application, have buried this Court with an avalanche of documentation." As Justice Brennan has observed:

> Appeals from award of attorneys' fees * * * must be one of the least socially productive types of litigation imaginable * * * In systemic terms, attorneys' fee appeals take up lawyers, and judges, time that could be more profitably be devoted to other cases.

This is an undesirable, but inevitable, result of the misapplication of fee-shifting statutes designed only to make competent counsel available to those who otherwise could not afford it.

The burden of this misapplication of proceedings falls not only on the parties but increasingly on the courts. At a time when Federal judges are overburdened under a rapidly expanding caseload, surely there are few obligations less appropriate for a life-tenured article III judge than to pore over stacks of billing records and evaluate affidavits on billing rates.

The Federal courts, and particularly the Supreme Court have long recognized the concerns we have expressed. In searching for solutions, they have repeatedly called on Congress for guidance. Failing that, they have fashioned judge-made rules for the award of attorneys' fees under Federal fee-shifting statutes. For example, in the last few years the Supreme Court decided four cases limiting the circumstances in which attorneys' fees may be awarded. In *Ruckelshaus* v. *Sierra Club*, 103 S. Ct. 3274 (1983), the Court held that attorneys' fees may not be awarded under statutes that provide such award "where appropriate" unless the party has achieved some degree of success on the merits. In *Hensley* v. *Ecker-*

hart, 461 U.S. 424 (1983), the Court held that parties are not to be awarded fees for work on issues which they did not prevail even if they prevailed on other issues. In *Blum* v. *Stenson*, 104 S. Ct. at 1549, the Court held that "neither complexity nor novelty of the issues * * * is an appropriate factor in determining whether to increase the fee award." Finally, in *Smith* v. *Robinson*, 104 S. Ct. 3457 (1984), the Court affirmed the denial of attorneys' fees in a case under the Education of the Handicapped Act (20 U.S.C. 1415), because the act does not provide for the award of attorneys' fees, and the Court did not need to address claims under 42 U.S.C. 1983 or 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

Despite these admirable efforts to bring some order and consistency to the application of Federal fee-shifting statutes, the entire burden of defining the appropriate standards for the award of attorneys' fees should not depend upon the courts and a case-by-case approach. The Federal courts—and the Supreme Court in particular—already have too pressing a docket of cases before them to allow such an approach. Even apart from the direct burden on the judicial system, the result of creative judicial attempts to set standards where Congress has provided none may well be, in Justice Brennan's words:

> A vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit-splits) in its wake.

In our view, Congress itself should finish the job it began but largely failed to complete in passing these fee-shifting statutes initially. Congress itself should define the circumstances and procedures for the award of attorneys' fees under the various statutes it has enacted.

The Department's proposed legislation is intended specifically to provide better legislative standards for attorneys' fee award, to reduce the incidence of excessive claims, to alleviate the burden on the courts and the parties, and to prevent inappropriate burdens on the public purse. In our view, the problems that Judge Gesell so eloquently identifies require congressional action.

Liability of State and local governments: Although my testimony has so far focused primarily on the award of attorneys' fees against the Federal Government, the same problems are in some respects ever more serious for State and local governments. Under the Constitution, the States themselves are generally protected by the 11th amendment against monetary liability to their citizens in suits in the Federal courts.

However, under recent Supreme Court decisions, Federal actions can be brought against State officials and municipalities under 42 U.S.C. 1983 for violation of almost any Federal statutory right—even those having nothing to do with the traditional concept of civil rights—with a corresponding right to attorneys' fees under section 1988. Growing concern has also arisen over Supreme Court decisions making local governments liable to suits under the Federal antitrust laws, with a corresponding liability for attorneys' fees.

Attorneys' fee awards against the States and the local governments have greatly expanded in recent years, far exceeding the liability of the Federal Government. The States and local governments, however, have much more limited resources with which to pay attorneys' fee awards—particularly the smaller municipalities. The imposition of attorneys' fee liability on States and localities imposes upon Congress an even greater obligation to define more clearly the scope of Federal fee-shifting statutes. Both the principle of federalism and commonsense require that effort by Congress.

In this respect, I am happy to see the panel of State attorneys general who are here to testify today on this legislation. Last year, the National Association of Attorneys General issued an excellent report on attorneys' fee awards against State and local governments under 42 U.S.C. 1988, the principal Federal fee-shifting statute applicable to them. That report sets forth an exhaustive analysis of the problem in this area and it deserves the careful consideration of Congress in weighing improvements to fee-shifting statutes.

III. THE EQUAL ACCESS TO JUSTICE ACT

Congress recently enacted Public Law 99-80, reauthorizing the Equal Access to Justice Act [EAJA]. The act allows the award of attorneys' fees to certain parties who successfully litigate against the Government unless the Government demonstrates that its position is substantially justified or that special circumstances exist that make a fee award unjust. Like other fee-shifting statutes, EAJA was passed because of perception that the cost of litigation deters some individuals and small businesses from challenging unreasonable Government action. We believe that the EAJA promotes Government accountability without resulting in excessive fee awards. Some of the same principles upon which EAJA is based—for example, clear statutory standards and a $75-per-hour cap—are incorporated in this legislation.

IV. DESCRIPTION OF THE PROVISIONS OF S. 1580

The purpose of the bill we support today is to make court awards of attorneys' fees in suits against the Government fairer and more predictable. The bill would preserve the availability of counsel by maintaining an adequate level of compensation for attorneys who prevail, but at the same time, it would rein in the excessive awards to attorneys at the taxpayers' expense. This legislation would bring greater balance to the award of attorneys' fees against the Government.

Let me briefly summarize the provisions of the bill. S. 1580 would modify all Federal statutes that authorize awards of attorneys' fees against Federal, State, or local governments, in the following ways:

1. It would establish three prerequisites to an award of attorneys' fees against a government entity under all Federal fee-shifting statutes:

First, a party must prevail on the merits of its complaint in order to recover fees. See *Ruckelshaus* v. *Sierra Club,* supra—attorneys' fees are recoverable only by parties who prevail in a case.

Second, fees would be allowed only if the work for which the fee award is sought was in connection with issues upon which the party prevailed, see *Hensley* v. *Eckerhart,* supra, and was not excessive, redundant, or otherwise unnecessary to resolve the controversy.

Third, the application for attorneys' fees must comply with the procedural requirements of the act and not exceed amounts authorized under the act.

2. The bill would establish a $75-per-hour fee cap for all attorney compensation subject to the litigation. That is, it would provide for a maximum rate of $75 per hour for attorneys' fee awards in civil judicial and administrative proceedings under all Federal fee-shifting statutes. This same amount was recently reaffirmed by Congress to be appropriate for fee awards under the Equal Access to Justice Act, 28 U.S.C. 504 and 2412(d), and is more than attorneys who represent the Federal Government in litigation presently earn, even with overhead and fringe benefits taken into account.

To promote fairness and further the comprehensive purposes of the bill, the bill also would impose the same $75 limitation on litigation on behalf of the Federal Government or Federal officials. Thus, the bill would specifically amend the independent counsel statute, 28 U.S.C. 593(g), to impose the same limitations upon any fee award to a subject of an investigation under the statute; and it would likewise impose a $75-per-hour limit on the amounts payable to outside private counsel retained by any Federal agency for litigation and paid from appropriate funds.

I am providing for the record, in addition to the table mentioned earlier in my testimony, three sets of tables of cases for which we have been able to gather information. One, table B, is drawn from awards paid from the judgment fund by the General Accounting Office. The second table, table C, sets forth awards paid in cases filed in the district court for the District of Columbia. The third, table D, shows awards against State and local governments in reported cases. These tables reflect the great disparity in hourly rates in the cases, but indicate that a limitation of $75 per hour is a reasonable and defensible amount. Even in the District of Columbia, where legal fees would be expected to be among the highest in the country—and where a large percentage of all civil fee-shifting cases is brought—a substantial number of awards have been for no more than $75 per hour. Of course, courts and agencies would still be free to award attorneys' fees at an hourly rate lower than the $75 maximum rate.

3. The bill specifically would preclude the use of multipliers or bonuses to augment any award of attorneys' fees under any Federal fee-shifting statute.

4. The bill would also permit a court or agency to reduce or deny awards of attorneys' fees for certain established reasons: For example, when the prevailing party unreasonably protracted the final resolution of the controversy, or when other specific factors make a denial or reduction of the fee award appropriate. When a money judgment is awarded against the United States, or against a State or local government sufficient to pay legal fees, the bill would provide for a reduction (but not more than 25 percent) of the amount of the judgment on account of the amount of attorneys' fees awarded. Moreover, consistent with the Supreme Court's decision in *Maret* v. *Chesny*, 105 S. Ct. 3012, 3016–18 (1985)—construing Rule 68, Fed. R. Civ. P.—the bill would disallow a fee award for services

performed by an attorney following a written offer of settlement, if the party does no better in litigation after having rejected the settlement offer.

5. Finally, the bill would create a uniform requirement that applications for attorneys' fee awards must be filed within 30 days of a final decision on the merits by the court or agency from which no appeal is taken.

This bill would not create an independent right to attorneys' fees; the right to an award of attorneys' fees could be derived only from other specific Federal laws. The bill also would not supersede other requirements established by law. For example, in accordance with case law, the bill would allow recovery of attorneys' fees when a case is mooted by a change in Government policy, if the party obtains substantially the relief sought and the Government is unable to prove that the lawsuit was not a "material factor" in the change of policy. In addition the provisions of the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1), that deny attorneys' fees to an otherwise eligible party when "the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust" would continue to apply.

In summary, the bill would prevent the increasing number of serious abuses of Federal fee-shifting statutes that have occurred in recent years. It would, however, preserve the intent of Congress to extend reasonable legal assistance to groups and individuals who need it. The bill would inject much-needed clarity into the current law of attorneys' fees. And it would set an overall fee limitation that is reasonable. We feel all of these provisions—taken as a whole—warrant broad and bipartisan support in the Congress.

Mr. JENSEN. Thank you, Mr. Chairman. I would be happy to answer any questions.

[Prepared statement and responses to written questions follows:]

PREPARED STATEMENT OF D. LOWELL JENSEN

Mr. Chairman and members of the Subcommittee:

I am pleased to appear today in support of S. 1580, a bill "to provide comprehensive reforms and to achieve greater equity in the compensation of attorneys pursuant to federal statute in civil and administrative proceedings in which the United States, or a state or local government, is a party." The Department of Justice has proposed this bill to bring some much needed rationality to the system for awarding attorneys' fees -- paid for by the taxpayer -- under the numerous attorneys' fee statutes enacted by Congress.

According to a recent survey, 1/ Congress has enacted some 131 statutes providing for the award of attorneys' fees to parties in litigation before the courts or before administrative agencies. A significant percentage of these statutes allows private parties to recover attorneys' fees from the federal government or from the states.

In all such enactments, Congress has altered the traditional American Rule that each party to litigation bears its own legal expenses, greatly expanding the circumstances in which the federal government and the states and local governments are held liable for the legal expenses of the opposing private parties in litigation. Indeed, the recently reenacted Equal Access to Justice Act, codified at 28 U.S.C. §§ 504 and 2412(d), provides for the award of attorneys' fees to any prevailing party who meets certain eligibility requirements unless the federal government can show that its position in the litigation was substantially justified.

These so-called fee-shifting statutes were each enacted in response to important concerns. They reflect the judgment of Congress that a departure from the American Rule is appropriate to enable indigent parties, small businesses, victims of discrimination, and others to attract competent counsel to vindicate meritorious claims. We believe that ensuring the availability of competent counsel to enforce the rights of those who may not otherwise be able to afford representation is a praiseworthy objective. The worthiness of the goals sought to be achieved by most fee-shifting statutes cannot be doubted.

Support for these goals, however, should not blind us to equally valid concerns about the financial strain these statutes impose on the public treasury, or to the ever-increasing burdens they place on the judicial system. For example, with the notable exception of the Equal Access to Justice Act, these fee-shifting statutes provide courts only rudimentary standards and principles for the award of attorneys' fees and afford no viable checks on escalating fee demands. As a result, as I describe below, the cases awarding attorneys' fees are frequently marked by a confusion over the proper bases for fee awards, a waste of judicial resources in determining the proper award and, in many instances, inordinately high fee awards. As Professor Berger so aptly observed,

> "The only truly consistent thread that runs throughout federal court decisions on attorneys' fees is their almost complete inconsistency." 2/

The Department of Justice naturally has a considerable interest in the award of statutory attorneys' fees. This Department represents federal government agencies in most of the enforcement suits brought by the government; and it defends the great majority of suits brought against the government by private plaintiffs. In addition, the Department of Justice is the principal federal agency monitoring the court system.

We believe that at least part of the confusion manifest in the attorneys' fees area is due to the almost total lack of coordinated consideration of the various civil fee-shifting statutes -- in relation to each other and to the Criminal Justice Act attorneys' fee provisions. This has gone on long enough. It is now time for issues relating to government compensation of private attorneys to be addressed on a comprehensive and coordinated basis.

I. The Purpose of Reform

Perhaps the best analogy supporting the need for attorneys' fee reform is the federal government's experience in providing medical care to the aged and needy. Through the Medicare and Medicaid programs, the government has undertaken to provide adequate medical and health care to millions of citizens. Through long experience, however, Congress and the health care agencies have found that, no matter how worthy the general goal, the system to be effective and efficient must be structured to prevent excessive cost and to avoid creating incentives for needless medical procedures. There must be adequate mechanisms to ensure that health care providers are not paid unreasonably high fees or compensated for treatment that is unnecessary. The legislation of recent years abandoning a cost-based system of compensation and substituting a fixed prospective payment system has reined in some of the excesses of the past and provided more rational incentives to hold down medical costs.

Thus, under the new Medicare procedures, hospitals are limited to specified charges for their work, and can no longer charge their "going rate," no matter how high. Patients are entitled to medical care, but not without regard to the cost.

We similarly need to reevaluate the current method of awarding statutory attorneys' fees. Just as in the medical area, the purpose of such attention is not to deprive deserving claimants of adequate legal representation. Instead, we must work to ensure that the purposes of these attorneys' fees statutes are properly carried out by protecting taxpayers from having to foot the bill for exorbitant legal fees or unnecessary litigation. Like unnecessary medical procedures which benefit no one but the doctor or hospital, unnecessary litigation benefits no one but the lawyer. And just as the medical payment system can be restructured to deter excessive medical procedures and provide incentives to hold down costs, federal fee-shifting statutes can be adjusted to prevent excessive fees and to provide incentives to hold down costs.

Another analogy is presented by the Criminal Justice Act, 18 U.S.C. § 3006A, which provides for the payment of counsel appointed to represent indigent defendants. Although those defendants are faced with the loss of their liberty through conviction and incarceration, and often seek vindication of various constitutional rights related to their case, the CJA has never adopted a "prevailing market rate" approach for the compensation of counsel. The payment rates have been strictly limited by law -- recently raised to $60 per hour for in-court time and $40 per hour for other time, subject to various per-case limits. The limitation of attorneys' fees in these cases has never been thought to be inconsistent with society's interest in providing counsel to indigents to vindicate their rights.

The rules for civil fee-shifting statutes, however, heretofore have been governed by markedly different principles, principles that often serve to encourage excessive fee awards and a multiplication of litigation both on the merits of questionable claims and over the amount of the fees in cases where the plaintiff does prevail. The benefit to the nominal plaintiff all too often is overshadowed by the secondary issue of attorneys' fees.

II. Problems with Civil Fee-Shifting Statutes

Upon examination, we find that three different types of difficulties typically occur in the administration of the various federal fee-shifting statutes. First, and perhaps most obvious, is the increasing incidence of inordinately high attorneys' fees awards through the use of high hourly rates, multipliers, and other means. Second, and somewhat related to the first, is the great disparity in awards that seems at times to border on the irrational. Third, and increasingly noticed by judges and commentators, is the growing burden on the courts and the litigants imposed by a system in which the rules are unclear and parties are encouraged to engage in expensive litigation of attorneys' fees issues rather than to enter into prompt and inexpensive settlement agreements. Finally, though much of the Department's immediate attention focuses on the effect of federal fee-shifting statutes, the states and local governments are experiencing these problems on even a larger scale -- because their scope of potential liability is greater and because attorneys' fee awards can pose a much greater burden on the public treasuries of local governments.

A. In General

In our experience, courts frequently have either interpreted fee-shifting statutes inconsistently or reached inappropriate results. For example, courts have awarded fees to parties far in excess of the relief obtained on the merits. 3/ In addition, attorneys' fees are generally based on the "prevailing market rate" for legal services in the community. See Blum v. Stenson, 104 S. Ct. 1541, 1545-47 (1984) (nonprofit legal services attorneys awarded fees based on prevailing market rates for corporate law firms). In practice, this often means that the hourly rates awarded are as high as those charged by silk stocking corporate law firms, rather than on a fee that is sufficient to attract competent counsel. The prevailing rate in high-priced markets like the District of Columbia often reflects the highly specialized nature of the legal practice in that market.

Thus, taxpayers often end up compensating attorneys for basic legal work at rates lawyers charge large corporate clients for their special skills and expertise in complex legal matters. The use of a "prevailing rate" system to calculate fee awards often produces awards that increasingly bear little relationship to the actual cost necessary to make legal representation available to parties in litigation.

Again, drawing on the analogy to medical services, this would be like compensating all doctors for routine medical procedures on the basis of rates charged by Dr. Denton Cooley. A Washington Post editorial (Dec. 16, 1983, at 22, col.1) explained succinctly why it is inappropriate to require the government to bear the same high hourly rates that corporate law firms may demand from their clients:

> "Just because well-heeled private clients dole out huge sums doesn't mean that the public should be equally generous. The 'prevailing wage' approach that government uses when it is buying services . . . has a superficial appeal. But on closer inspection it reveals elements of a gigantic rip-off."

In practice, as that editorial suggests, the trend in attorneys' fee awards may be to make publicly financed fee awards even more generous than fees charged in private practice. Because the constraints that normally apply in private practice -- discussion and negotiation of the fees with the client -- are absent in the fee-shifting context (see Blum v. Stenson, 104 S. Ct. at 1547 n.11), attorneys are given the incentive to ask for ever-increasing hourly rates. Indeed, it is now not uncommon for attorneys to be awarded fees that even exceed the hourly rates that the attorneys seeking fees normally would charge their private clients. 4/

In addition to overcompensating lawyers for basic legal work, the use of a "prevailing rate" system often subsidizes large firms that use "pro bono" cases to train their younger, less experienced lawyers. As Judge Gerhard Gesell of the District Court here in Washington recently wrote:

> "It is now accepted that lawyers who prevail in [Equal Access to Justice Act] cases may be entitled to be paid a reasonable fee for services which are still somewhat euphemistically referred to as 'pro bono.' Attorneys hope to receive and usually request massive fees which cover their time, overhead, out-of-pocket expenses and a handsome profit. Often the government is asked to pay for the 'learning experiences' of coveys of junior associates and other assistants assigned to a case to break the tedium of everyday practice. The concept of merely making lawyers whole has long since gone out the window. As yet, courts have had little success in fashioning tools for dealing with this burgeoning phenomenon.
>
> ". . . Lawyers who treat the EAJA as designed to compensate counsel in the same generous manner as some lawyers are compensated in private practice should take heed of the consequences. In passing this statute Congress clearly indicated that it did not intend to place such a heavy burden on the public purse. Failure to reach prompt and reasonable fee dispositions by settlement or efficient use of court proceedings may

> eventually jeopardize the golden goose. Congress, for its part, would do well to consider how the fee-setting process may be streamlined, perhaps through use of arbitration or promulgation of more definitive and simplified standards for passing on such fee requests." 5/

As the initial three-judge panel in Copeland v. Marshall, 594 F.2d 244, 257 n.75 (D.C. Cir. 1978), stated:

> "It is not our intent to establish a sub-class of fees payable for Title VII litigation or to relegate, in any way, the vindication of Title VII rights to second-class status. To do so, obviously, would run counter to the very purpose for which Title VII was enacted. . . . But it is our intent to resist the imposition on the public sector of the highest standards of legal remuneration adopted in the private sector -- standards which are out of line with the ethic of public service with which attorneys are encouraged to engage in public interest litigation, and which may even risk turning the public against the very provisions for the award of attorneys' fees on which appellees rely in this case."

We have also found that some courts have used bonuses and multipliers to increase the base fee award -- sometimes doubling 6/ or even tripling 7/ the hourly rates. Indeed, based upon cases reported in the past several years for which we have been able to gather information, we estimate that the use of upward adjustments or multiplication factors to increase the reasonable hourly rate has increased the amount that government was required to pay in attorneys' fees by an average of forty-three percent at the federal level, and by forty-one percent at the state and local level. 8/

We do not believe that bonuses and multipliers should be used to increase the hourly rate that the court has already determined to be reasonable. Several different rationales have been offered for the use of bonuses and multipliers -- including the novelty and complexity of the issues, the high quality of representation, and delays in payment. However, every lawyer must confront these considerations in the ordinary course of litigation. The quality of representation should be reflected in the hourly billing rate; the novelty and complexity of issues should be reflected in the hours reasonably expended. For these reasons, the Supreme Court's decision in Blum v. Stenson, 104 S. Ct. at 1548-49, generally ruled out multipliers based upon such factors.

Another factor often mentioned as a basis for awarding a bonus is to cover the risk of not prevailing in a case. Though the Supreme Court has not yet addressed this issue squarely (see Blum v. Stenson, 104 S. Ct. at 1550 n.17), we also believe that the risk of not prevailing is always part of any litigation. 9/ To award multipliers based upon a contingency factor clearly would be inconsistent with the spirit and intent of the various federal fee-shifting statutes, each of which provides for the award of fees only to a party who achieves some specific degree of success on the merits. As the federal court of appeals here in Washington recently observed:

> "Awarding an upward adjustment to the lodestar for the risk of losing and the concomitant risk of not obtaining an award of attorneys' fees is not unlike compensating an attorney for unsuccessful claims; it hedges the statute's requirement that only prevailing parties may recover attorneys' fees." 10/

We oppose any such evasion of the statutory standards of eligibility for attorneys' fees. In fact, augmenting the fee award when the chances of recovery are least could have the perverse effect of penalizing most those parties whose conduct is least blameworthy.

In enacting the various fee-shifting statutes, Congress has attempted to increase access to counsel, not to "create a . . . fee bank to be liberally drawn upon by lawyers for their own welfare." 11/ In practice, however, high hourly rates combined with bonuses and multipliers only encourage unmeritorious litigation. The system has clearly gone awry when, as is now often the case, litigation is driven by the prospect of high fee awards and not by the merits of an individual case. As Judge Wilkey observed in dissent in Copeland v. Marshall, 641 F.2d 880, 920 (D.C. Cir. 1980) (en banc) (emphasis in original):

> "Eliminating the barrier of attorney's fees encourages plaintiffs to assert their legal and civil rights. . . . But encouraging injured plaintiffs is a goal distinct from that of encouraging lawyers with the lure of attorneys' fees bonanzas. The majority's philosophy appears to be solicitous of the 'sellers' of legal services beyond the needs of the 'buyers' of these services."

The need for corrective legislation is heightened by the fact that, under present law, federal litigators may be powerless to limit fee awards to reasonable levels. For example, since Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984), the D.C. Circuit has repeatedly chastised government attorneys for refusing to settle fee applications without contest for more than $75 per hour for partners and $60 per hour for associates. 12/

Finally, cases awarding overly generous compensation to private attorneys also contrast sharply with the strictly limited salaries paid to attorneys who represent the government. As one court observed in a leading case, fee-shifting statutes are not intended "to make the private attorney general's position so lucrative as to ridicule the public attorney general." 13/ When retaining private counsel (for example, to represent individual federal employees in Bivens cases), the Department of Justice's Civil Division successfully limits the billing rates to no more than $75 per hour. Moreover, when the government itself is awarded attorneys' fees by law (for example, in frivolous tax litigation), the Department relies upon average hourly rates (based on actual cost) ranging from approximately $30 for junior attorneys to approximately $60 for the most senior.

The situation under fee-shifting statutes is startlingly different. In one case that attracted considerable publicity (see New York Times, Dec. 14, 1983, at A22, col. 1), a law professor petitioned for an award of $332,441 -- at a billing rate of $275 per hour plus a multiplier of fifty percent, for an effective rate of $412.50 -- after he had successfully urged the Supreme Court to strike down a Massachusetts law that allowed churches and schools to veto liquor licenses for neighboring businesses. 14/ Though incurring little of the overhead expenses of attorneys in private practice, he argued that this rate was reasonable because comparable practitioners in the community charged similar rates and he had charged even higher rates to his private clients. The district court awarded the full hourly rate of $275, but denied the requested 50% multiplier, 15/ prompting the Washington Post to editorialize (Dec. 16, 1983, at A22, col. 1) that the state had been asked to pay "a pretty hefty fee for a moonlighting academic who wins a liquor license case." Ultimately, the court of appeals reduced the rate to $175 per hour -- still a rather sizable fee by any standard. Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 956 (1st Cir. 1984).

In addition, fee issues increasingly overshadow the case on the merits and deplete valuable judicial resources. See Ashton v. Pierce, 580 F. Supp. 440, 444 (D.D.C. 1984) ("Often these fee requests consume more court time and involve more paperwork than the underlying case").

The issue of attorneys' fees has become such a big ticket item in many cases that lawyers now retain their own counsel to handle such issues. 16/ Indeed, some law firms have long advertised their specialization in the recovery of attorneys' fees under federal statutes. See, e.g., Legal Times, August 1982, at 14. There are even special treatises and reporters devoted entirely to the issue of attorneys' fees. See, e.g., M. Derfner and A. Wolf, Court Awarded Attorney Fees (1983); Attorney Fee Awards Reporter.

Moreover, detailed factual showings may be necessary to justify hourly rates, for example, requiring discovery and evidentiary proceedings in some cases. The district court in Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354, 389 (D.D.C. 1983), complained of "attorneys who, in their fervor to produce a thorough fee application, have buried this Court with an avalanche of documentation." As Justice Brennan has observed,

> "appeals from awards of attorneys' fees . . . must be one of the least socially productive types of litigation imaginable. . . . [I]n systemic terms, attorney's fee appeals take up lawyers' and judges' time that could more profitably be devoted to other cases." 17/

This is an undesirable, but inevitable, result of the misapplication of fee-shifting statutes designed only to make competent counsel available to those who otherwise could not afford it.

The burden of this multiplication of proceedings falls not only on the parties but increasingly on the courts. At a time when federal judges are overburdened under a rapidly expanding caseload, surely there are few obligations less appropriate for a life-tenured Article III judge than to pore over stacks of billing records and evaluate affidavits on billing rates.

The federal courts, and particularly the Supreme Court, have long recognized the concerns we have expressed. In searching for solutions, they have repeatedly called on Congress for guidance. Failing that, they have fashioned judge-made rules for the award of attorneys' fees under federal fee-shifting statutes. For example, in the last few years the Supreme Court decided four cases limiting the circumstance in which attorneys' fees may be awarded. In Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983), the Court held that attorneys' fees may not be awarded under statutes that provide for such awards "where appropriate" unless the party has achieved some degree of success on the merits. In Hensley v. Eckerhart, 461 U.S. 424 (1983), the Court held that parties are not to be awarded fees for work on issues on which they did not prevail even if they prevailed on other issues. In Blum v. Stenson, 104 S. Ct. at 1549, the Court held that "[n]either complexity nor novelty of the issues . . . is an appropriate factor in determining whether to increase the fee award." Finally, in Smith v. Robinson, 104 S. Ct. 3457 (1984), the Court affirmed the denial of attorneys' fees in a case under the Education of the Handicapped Act (20 U.S.C. § 1415), because that Act does not provide for the award of attorneys' fees, and the court did not need to address claims under 42 U.S.C. § 1983 or § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Despite these admirable efforts to bring some order and consistency to the application of federal fee-shifting statutes, the entire burden of defining the appropriate standards for the award of attorneys' fees should not depend upon the courts and a case-by-case approach. The federal courts -- and the Supreme

Court in particular -- already have too pressing a docket of cases before them to allow such an approach. Even apart from the direct burden on the judicial system, the result of creative judicial attempts to set standards where Congress has provided none may well be, in Justice Brennan's words,

> "a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit-splits) in its wake." 18/

In our view, Congress itself should finish the job it began but largely failed to complete in passing these fee-shifting statutes initially. Congress itself should define the circumstances and procedures for the award of attorneys' fees under the various statutes it has enacted.

The Department's proposed legislation is intended specifically to provide better legislative standards for attorneys' fee awards, to reduce the incidence of excessive claims, to alleviate the burden on the courts and the parties, and to prevent inappropriate burdens on the public purse. In our view, the problems that Judge Gesell so eloquently identifies require Congressional action.

B. Liability of State and Local Governments

Although my testimony has so far focused primarily on the award of attorneys' fees against the federal government, the same problems are in some respects even more serious for state and local governments. Under the Constitution, the states themselves are generally protected by the Eleventh Amendment against monetary liability to their citizens in suits in the federal courts. However, under recent Supreme Court decisions, federal actions can be brought against state officials and municipalities under 42 U.S.C. § 1983 for violations of almost any federal statutory right -- even those having nothing to do with the traditional concept of civil rights 19/ -- with a corresponding right to attorneys' fees under § 1988. Growing concern has also arisen over Supreme Court decisions making local governments liable to suits under the federal antitrust laws, with a corresponding liability for attorneys' fees. 20/

Attorney's fee awards against the states and local governments have greatly expanded in recent years, far exceeding the liability of the federal government. The states and local governments, however, have much more limited resources with which to pay attorneys' fee awards -- particularly the smaller municipalities. The imposition of attorneys' fee liability on states and localities imposes upon Congress an even greater obligation to define more clearly the scope of federal fee-shifting statutes. Both the principle of federalism and common sense require that effort by the Congress.

In this respect, I am happy to see the panel of state attorneys general who are here to testify today on this legislation. Last year, the National Association of Attorneys General issued an excellent report on attorneys' fee awards against state and local governments under 42 U.S.C. § 1988, the principal federal fee-shifting statute applicable to them. That report sets forth an exhaustive analysis of the problems in this area and it deserves the careful consideration of Congress in weighing improvements to fee-shifting statutes.

III. The Equal Access to Justice Act

Congress recently enacted Pub. L. 99-80, reauthorizing the Equal Access to Justice Act (EAJA). The Act allows the award of attorneys' fees to certain parties who successfully litigate against the government unless the government demonstrates that its position is substantially justified or that special circumstance exist that make a fee award unjust. Like other fee-shifting statutes, EAJA was passed because of perception that the cost of litigation deters some individuals and small businesses from challenging unreasonable government action. We believe that the EAJA promotes government accountability without resulting in excessive fee awards. 21/ Some of the same principles upon which EAJA is based (e.g., clear statutory standards and a $75 per hour cap) are incorporated in this legislation.

IV. Description of the Provisions of S. 1580.

The purpose of the bill we support today is to make court awards of attorneys' fees in suits against the government fairer and more predictable. The bill would preserve the availability of counsel by maintaining an adequate level of compensation for attorneys who prevail, but at the same time it would rein in the excessive awards to attorneys at the taxpayers' expense. This legislation would bring greater balance to the award of attorneys' fees against the government.

Let me briefly summarize the provisions of the bill. S. 1580 would modify all federal statutes that authorize awards of attorneys' fees against federal, state, or local governments, in the following ways:

1. It would establish three prerequisites to an award of attorneys' fees against a government entity under all federal fee-shifting statutes: First, a party must prevail on the merits of its complaint in order to recover fees. See Ruckelshaus v. Sierra Club, supra (attorneys' fees are recoverable only by parties who prevail in a case). Second, fees would be allowed only if the work for which the fee award is sought was in connection with issues upon which the party prevailed, see Hensley v. Eckerhart, supra, and was not excessive, redundant, or otherwise unnecessary to resolve the controversy. Third, the application for attorneys' fees must comply with the procedural requirements of the Act and not exceed amounts authorized under the Act.

2. The bill would establish a $75 per hour fee cap for all attorney compensation subject to the legislation. That is, it would provide for a maximum rate of $75 per hour for attorneys' fee awards in civil judicial and administrative proceedings under all federal fee-shifting statutes. This same amount was recently reaffirmed by Congress to be appropriate for fee awards under the

Equal Access to Justice Act, 28 U.S.C. §§ 504 and 2412(d), and is more than attorneys who represent the federal government in litigation presently earn, even with overhead and fringe benefits taken into account.

To promote fairness and further the comprehensive purposes of the bill, the bill also would impose the same $75 limitation on litigation on behalf of the federal government or federal officials. Thus, the bill would specifically amend the Independent Counsel statute, 28 U.S.C. § 593(g), to impose the same limitation upon any fee award to a subject of an investigation under the statute; and it would likewise impose a $75 per hour limit on the amounts payable to outside private counsel retained by any federal agency for litigation and paid from appropriated funds.

I am providing for the record, in addition to the table mentioned earlier in my testimony, three sets of tables of cases for which we have been able to gather information. One, Table B, is drawn from awards paid from the judgment fund by the General Accounting Office. The second table, Table C, sets forth awards paid in cases filed in the district court for the District of Columbia. The third, Table D, shows awards against state and local governments in reported cases. 22/ These tables reflect the great disparity in hourly rates in the cases, but indicate that a limitation of $75 per hour is a reasonable and defensible amount. Even in the District of Columbia, where legal fees would be expected to be among the highest in the country (and where a large percentage of all civil fee-shifting cases is brought), a substantial number of awards have been for no more than $75 per hour. Of course, courts and agencies would still be free to award attorneys' fees at an hourly rate lower than the $75 maximum rate.

3. The bill specifically would preclude the use of multipliers or bonuses to augment any award of attorneys' fees under any federal fee-shifting statute.

4. The bill would also permit a court or agency to reduce or deny awards of attorneys' fees for certain established reasons: for example, when the prevailing party unreasonably protracted the final resolution of the controversy, or when other specific factors make a denial or reduction of the fee award appropriate. When a money judgment is awarded against the United States, or against a state or local government sufficient to pay legal fees, the bill would provide for a reduction (but not more than 25%) of the amount of the judgment on account of the amount of attorneys' fees awarded. Moreover, consistent with the Supreme Court's decision in Marek v. Chesny, 105 S. Ct. 3012, 3016-18 (1985) (construing Rule 68, Fed. R. Civ. P.), the bill would disallow a fee award for services performed by an attorney following a written offer of settlement by the United States, or by a state or local government, if the party does no better in litigation after having rejected the settlement offer.

5. Finally, the bill would create a uniform requirement that applications for attorneys' fee awards must be filed within 30 days of a final decision on the merits by the court or agency from which no appeal is taken.

This bill would not create an independent right to attorneys' fees; the right to an award of attorneys' fees could be derived only from other specific federal laws. The bill also would not supersede other requirements established by law. For example, in accordance with case law, the bill would allow recovery of attorneys' fees when a case is mooted by a change in government policy, if the party obtains substantially the relief sought and the government is unable to prove that the lawsuit was not a "material factor" in the change of policy. In addition the provisions of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1), that deny attorneys' fees to an otherwise eligible party when "the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust" would continue to apply.

* * *

In summary, the bill would prevent the increasing number of serious abuses of federal fee-shifting statutes that have occurred in recent years. It would, however, preserve the intent of Congress to extend reasonable legal assistance to groups and individuals who need it. The bill would inject much-needed clarity into the current law of attorneys' fees. And it would set an overall fee limitation that is reasonable. We feel all of these provisions -- taken as a whole -- warrant broad and bipartisan support in the Congress.

FOOTNOTES

1/ 8 Attorney Fee Awards Rep., No. 3 (June 1985) at 2-3.

2/ Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U. Pa. L. Rev. 281, 292 (1977). See also Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 11-12 (D.C. Cir. 1984).

3/ See, e.g., Rivera v. City of Riverside, 763 F.2d 1580 (9th Cir. 1985) (as amended Aug. 5, 1985) (affirming district court's refusal to reduce fee award of $245,456 where the judgment was only $33,350), stay granted, 54 U.S.L.W. 3143 (Aug. 28, 1985) (Rehnquist, Circuit Justice); Freeman v. Dole, 36 FEP Cases 686 (D.D.C. 1984) (fee award of $23,502.25 where plaintiff obtained $640 in backpay); Onisker, Logan & Dock v. Milliken, No. C-79-0142 (D. Utah July 18, 1980) (fee award of 22,000 where each of three inmates obtained judgments of $500). See also DiFilippo v. Morizio, 759 F.2d 231 (2d Cir. 1985) (the district court could not properly reduce $26,507.45 lodestar by 50 percent merely because the damage award was only $2,225.00 and issues were straightforward and not novel, but court of appeals ordered reduction in the claimed 302 hours as excessive).

4/ See Jordan v. Department of Justice, 691 F.2d 514, 523-24 (D.C. Cir. 1982) (fee allowances are basically to be measured by the market value of the services rendered, not the amount actually received by the attorney nor the amount that would have been received absent an award of fees); Copeland v. Marshall, 641 F.2d 880, 899 (D.C. Cir. 1980) (en banc) (attorneys are entitled to prevailing market rate even if it will yield a larger fee than that to which they are accustomed); Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 33-36 (D.C. Cir. 1984) (Wright, J., dissenting) (citing cases where court-awarded fees exceeded the rates normally charged by the attorneys).

5/ Ashton v. Pierce, 580 F. Supp. 440, 444 (D.D.C. 1984).

6/ E.g., Graves v. Barnes, 700 F.2d 220, 224 (5th Cir. 1983); Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354 (D.D.C. 1983); Wells v. Hutchinson, 499 F. Supp. 174, 211-12 (E.D. Tex. 1980).

7/ E.g., Rajender v. University of Minnesota, 546 F. Supp. 158, 172-74 (D. Minn. 1982) (atttorney's normal billing rates were tripled, resulting in total fee award of over $2 million); Keith v. Volpe, 501 F. Supp. 403, 414 (C.D. Cal. 1980) (multiplier of 3.5; total fee award of $2.2 million).

8/ This information presented in Table A of the materials that the Department is providing for the record.

9/ *See* Federal Judicial Center, *Attorney Fee Petitions: Suggestions for Administration and Management* 56 (1985) ("One quick solution to the contingency question is merely to assume that risks of lack of success, nonpayment, and delay are unavoidable features of the legal profession, and that the risk factor is encompassed by the . . . legal fees received").

10/ *Murray v. Weinberger*, 741 F.2d 1423, 1431 (D.C. Cir. 1984).

11/ *Coop v. City of South Bend*, 635 F.2d 652, 655 (7th Cir. 1980). The legislative history of 42 U.S.C. § 1988 explains that "a reasonable attorney's fee" is one that is "adequate to attract competent counsel, but . . . [does] not produce windfalls to attorneys." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976).

12/ *See Commonwealth of Puerto Rico v. Heckler*, 745 F.2d 709, 714 & n.7 (D.C. Cir. 1984) ("Nonnegotiable postures on fee awards may waste resources for all concerned;" hourly rates of $200 for partners, $100 for associates, and $50 for paralegals found reasonable); *Kyles v. Secretary of Agriculture*, 604 F. Supp. 426, 433-37 (D.D.C. 1985) ("If the defendant's conduct of this case is characteristic of the government's response to . . . clear statements of the law and admonitions about fee case administration, then the defendant has been . . . 'obdurate' and 'intransigent,' and has failed to make the 'conscientious effort' called for by the Supreme Court and our Court of Appeals;" hourly rates of $110 for partner, $55 for associates, and $35 for paralegals found reasonable).

13/ *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974), cited favorably in the legislative history of § 1988. See S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976).

14/ *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

15/ *Grendel's Den, Inc. v. Larkin*, 582 F. Supp. 1220, 1228-29 (D. Mass.), *modified*, 749 F.2d 945 (1st Cir. 1984). The law professor in that case had characterized the keeping of detailed time records as "a stupid waste of time." New York Times, Dec. 14, 1983, at A22, col. 1.

16/ *See*, *e.g.*, *Jones v. Stack*, 758 F.2d 567, 569 (11th Cir. 1985); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 958 (1st Cir. 1984).

17/ *Hensley v. Eckerhart*, 461 U.S. 424, 442, 455, (1983) (Brennan, J., concurring in part and dissenting in part).

18/ *Hensley v. Eckerhart*, 461 U.S. at 455 (Brennan, J., dissenting).

19/ *See*, *e.g.*, *Maine v. Thiboutot*, 448 U.S. 1 (1980) (state violation of federal statutory procedures for welfare payments); *Maher v. Gagne*, 448 U.S. 122 (1980) (state regulations in conflict with Social Security Act); *Roth v. Board of Regents*, 408 U.S. 564 (1971) (failure to renew contract for nontenured college instructor).

20/ *See City of Boulder v. Capital City Communications, Inc.*, 455 U.S. 40 (1981).

21/ Between October 1, 1981 (the effective date of the Act) and October 1, 1984, approximately $4 million have been awarded under the Act.

22/ We recognize, of course, that the tables of cases presented for the record are by no means complete and do not provide in each case the most useful kinds of information, but they are as complete as our research efforts could achieve. Unfortunately, many of the cases simply do not provide specific information on such matters as the hourly rate. The General Accounting Office information is current through 1983; because the GAO has not yet completed its implementation of a new computerized system for its files, we were unable to gather more recent information.

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General
Washington, D.C. 20530

November 19, 1985

The Honorable Orrin G. Hatch
Chairman, Subcommittee on the
  Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to respond to your letter of October 11, 1985, which attached written questions posed by the Subcommittee concerning S. 1580, the Legal Fees Equity Act. This discussion should be read together with my written statement submitted on October 8, which discusses these issues in greater detail, and with the Section-by-Section Analysis of S. 1580 prepared by the Department of Justice in proposing S. 1580. For convenience, each question is printed together with the response.

> QUESTION 1: You have stated that it is important to arrive at the proper incentive to attract attorneys to meritorious cases without overcompensating and thus subsidizing cases of less merit. According to your study of this question, will civil rights enforcement or environmental law enforcement be inhibited by a $75 per hour cap?

ANSWER: At the outset, I must note that this bill as drafted would apply not merely to civil rights actions or environmental law enforcement, but to all federal statutes that provide for an award of attorneys' fees against federal, state, or local governments. The intent of the bill is to treat civil rights or environmental actions precisely the same as all the actions for which attorneys' fees may be awarded against the government.

Specifically in response to your question, Congress enacted the Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C. § 1988) and statutory provisions like § 304(d) of the Clean Air Act (42 U.S.C. § 7604(d)) to improve the ability of individuals to enforce the civil rights and environmental laws by reducing the financial barriers that might otherwise deter disadvantaged plaintiffs from bringing meritorious suits to vindicate their civil rights. We firmly believe that ensuring the availability of competent counsel to enforce the rights of those who may not otherwise be able to afford representation is a praiseworthy goal. Support for this goal, however, should not blind us to equally valid concerns about the financial strains these statutes impose upon the public treasury, or to the ever-increasing burdens they place on the judicial system.

To ensure the availability of competent counsel for the vindication of meritorious claims, Congress provided that the courts may award to a successful plaintiff under most fee-shifting statutes "a reasonable attorney's fee." In the words of Senate Report on § 1988, the fee award should be one that is "adequate to attract competent counsel, but which does not produce windfalls to attorneys." 1/ We believe that the intent of Congress to provide a reasonable attorney's fee is of central importance. Unfortunately, however, because Congress has failed to specify with any precision the contours of a reasonable attorneys' fee, the various federal courts have been awarding fees at widely divergent levels -- some rather low and others unconscionably high -- and have applied a number of other inconsistent standards as well. In evaluating the experience of the courts in awarding attorneys' fees against governments at various levels, we have come to the firm belief that greater guidance from Congress is essential to redress that divergence, to rein in the occasional award of inordinately high hourly rates, and to reduce the incentives for counsel to litigate attorneys' fee issues out of a hope of obtaining an unusually large fee award.

To address these concerns, S. 1580 would establish more uniform rules to guide the determination of fee awards. None of the rules in S. 1580 is novel; each is adapted from a statutory or caselaw precedent.

For example, S. 1580's requirement that the party seeking fees must prevail on the merits is in no sense imposing a new limitation on attorneys' fee awards. The various fee-shifting statutes, including those that provide for an award of fees to parties seeking to enforce the civil rights or environmental laws, all require that the party must achieve some degree of success on the merits in order to obtain any award of attorneys' fees. See Hensley v. Eckerhart, 103 S. Ct. 3274 (1983). Thus, Congress itself has consistently made the judgment that parties who do not prevail in litigation should not receive an award of fees.

Similarly, the provision in S. 1580 limiting fee awards to no more than $75 an hour would not unjustifiably inhibit private civil rights or environmental law enforcement. First of all, we reject any contention that the adequacy of enforcement in any area can be measured by how high an award of attorneys' fees is made in each such case. Congress has sought to provide for the award of attorneys' fees that are adequate to attract competent counsel, but not so high as to result in windfalls to particular attorneys. Fee awards should not be paid at the same hourly rates demanded by silk stocking corporate law firms, but at rates that fairly compensate counsel for the legal services provided and that offer adequate incentives for plaintiffs to bring suits vindicating their rights.

The materials provided with my testimony (Tables B, C, and D) show that courts frequently have awarded fees at an hourly rate of $75 or less to attorneys who brought suits under various statutes, including civil rights actions. These tables clearly indicate that plaintiffs can attract competent counsel for $75 an hour or less. At this rate, attorneys who bill 1,500 hours a year would earn $112,500 annually.

This $75 hourly rate is based on the Equal Access to Justice Act, 28 U.S.C. §§ 504 and 2412(d). There Congress recently reaffirmed the determination that a general limit of $75 an hour was necessary and appropriate to forestall skyrocketing legal fee awards, yet was adequate to ensure quality representation. Experience under the EAJA demonstrates that a maximum rate of $75 per hour for attorneys' fee awards has been sufficient to attract competent counsel. I also note that the standard for entitlement to attorneys' fees under EAJA is stricter than it is under other fee-shifting statutes. Not only must the party seeking attorneys' fees prevail on the merits, but the court must find that the government's position was not "substantially justified." See 28 U.S.C. § 2412(d)(1)(A). Despite this extra hurdle, Congress found that counsel bringing cases under EAJA would be adequately compensated at $75 per hour. I see no reason why parties who are not subject to the potential defense of "substantial justification" also are not adequately compensated at a rate of $75 per hour.

Finally, S. 1580 would also eliminate bonuses and multipliers because, contrary to the spirit and intent of the various attorneys' fees statutes, they tend to promote meritless litigation and provide windfalls to attorneys. The Supreme Court has concluded that bonuses and multipliers generally should not be used to increase an hourly rate the courts have already found reasonable, on the basis of such factors as the quality of representation, the results obtained, and the novelty and complexity of issues. All of these considerations are normally reflected in the calculation of the hourly rate or in the number of hours reasonably expended on the case. See Blum v. Stenson 104 S. Ct. 1541, 1548-49 (1984).

Another rationale commonly given for multipliers, the risk of not prevailing in a case, is also inappropriate as the basis for a multiplier or bonus. The purpose of such a "contingency" bonus is to compensate counsel indirectly for cases in which the plaintiff does not prevail by overcompensating counsel for the cases in which the plaintiff does prevail. We believe that this circuitous method of compensating counsel for the expenses of the lost cases directly conflicts with the intention of Congress to impose the obligation of attorneys' fees only in those cases where the plaintiff in fact prevails. In those cases where the party does prevail, there is no longer any "contingency" on the question of success on the merits. In those cases, the government should only be required to pay the actual expenses of counsel in that case, not an additional amount designed to compensate counsel for the "contingency" that counsel might not have prevailed in that case or won't prevail in some other case.

As the D.C. Circuit observed on this issue:

> Awarding an upward adjustment to the lodestar for the risk of losing and the concomitant risk of not obtaining an award of attorneys' fees is not unlike compensating an attorney for unsuccessful claims; it hedges the statute's requirement that only prevailing parties may recover attorneys' fees.

Murray v. Weinberger, 741 F.2d 1423, 1431 (D.C. Cir. 1984). We believe that the requirements that Congress has imposed should be respected, not circumvented, and we do not accept the argument that adherence to the requirements Congress has established would undermine enforcement of the civil rights or environmental laws.

QUESTION 2: S. 1580 permits a judge to reduce a fee if the award would unreasonably exceed the relief obtained or if the prevailing party unreasonably engages in conduct that protracts the final resolution of the case. What standards should guide a judge in implementing this provision?

ANSWER: The provision in S. 1580 that permits a judge to reduce a fee if the award would unreasonably exceed the relief is not novel. It stems directly from guidelines Congress itself has provided to assist the courts in their determination of a "reasonable" attorney's fee. The Senate and House Reports accompanying 42 U.S.C. § 1988, for example, refer the courts to 12 factors identified in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Those factors include "the amount involved and the results obtained." Hensley v. Eckerhart, 461 U.S. 424, 430 n.3 (1983). Moreover, the Supreme Court has recognized that "[t]he product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" Id. at 434. See also Blum v. Stenson, 104 S. Ct. 1541, 1548 (1984) ("there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high").

The Supreme Court may soon offer some greater guidance on the judicial standards that should be followed in reducing a fee award that unreasonably exceeds the relief obtained. It has granted certiorari in *City of Riverside v. Rivera*, where the Ninth Circuit upheld a fee award under § 1988 of $245,456.25 though the plaintiffs had recovered only a total of $33,350 in damages. 2/ In staying the Ninth Circuit's mandate in this case, Justice Rehnquist stated, "I think the award of attorney's fees in this case, representing more than seven times the amount of the monetary judgment obtained, is so disproportionately large that it could hardly be described as 'reasonable.'" 54 U.S.L.W 3143, 3144 (U.S. Aug. 15, 1985) (Rehnquist, J., Circuit Justice). He suggested as a useful standard that the district court should reduce a fee award as unreasonably high if it determines that an award in that amount would grant the prevailing plaintiff "more generous court-ordered attorney's fees from [the] defendant than the plaintiff's attorney might himself have fairly charged to the plaintiff in the absence of a fee-shifting statute." *Id*. at 3144.

Other courts have suggested that such an exercise of "billing judgment" is no less important in fee-setting under federal attorneys' fees statutes than it is in the private sector. *Hensley v. Eckerhart*, *supra*, 461 U.S. at 434; *Jaquette v. Black Hawk County*, 710 F.2d 455, 460 (8th Cir. 1983); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980). *See also* Federal Judicial Center, *Attorney Fee Petitions: Suggestions for Administration and Management* 26, 34 (1985) (hereafter "*Attorney Fee Petitions*"). Thus, "[h]ours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." *Copeland v. Marshall*, *supra*, 641 F.2d at 891 (emphasis in original).

In many instances, disproportionately high fee requests reflect nonproductive or duplicative time, excessive hours, or simply poor judgment about the merits of the underlying claim or the prospect of success in litigation. *See Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1097 (5th Cir. 1982). Therefore, a court should closely examine fee requests that are unusually high in comparison to the results obtained to determine, among other things, whether more than one attorney was employed to perform a task where one attorney would have been sufficient, 3/ whether the time spent on a given task -- due to inexperience or nonproductivity -- is considerably more than the time normally required, 4/ whether attorneys have engaged in excessive conferencing or reading documents irrelevant to the specific issue under consideration; 5/ or whether the time spent to vindicate a violation of a right was reasonable in light of the amount one could reasonably expect to recover. 6/ As the Federal Judicial Center has advised, "[a]ll of these determinations by the judge may be based on common expectations of productivity, personal observation, and experience in other fee cases." *Attorney Fee Petitions* at 34.

Of course, by inclusion of this provision in S. 1580, we do not intend to suggest that substantial attorneys' fees cannot be awarded in cases involving primarily injunctive or other nonpecuniary relief. Nor would an unusually large attorney's fee necessarily be inappropriate where a defendant's bad faith conduct requires plaintiff's counsel to spend an inordinate amount of time on the case. But where only monetary judgments are at issue or the relief granted is minimal, we believe that a court should exercise its discretion to reduce an award if the fee would be disproportionate to the results obtained.

Similarly, we believe that the courts should be authorized to reduce an award of attorneys' fees in those cases where the prevailing party had unreasonably prolonged the litigation or had indulged in legal services that were plainly excessive in the context of the litigation. Frankly, we would anticipate that in most cases that litigants and the courts are already vigilant in addressing such forms of abuse in the litigation process, 7/ but believe that these principles should be plainly stated. As the Supreme Court stated in Hensley v. Eckerhart, supra, 461 U.S. at 434:

> Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. 8/

We believe that authorizing courts to supervise counsel's adherence to these principles serves the administration of justice.

QUESTION 3: Many legal commentators have noted considerable discrepancies between fee awards even before the same court. In fact, the Third Circuit Judicial Conference recommended standardization of rates before the same district court. This springs from the observation that some cases have awarded fees at a rate of $300 an hour while similar cases before the same court are compensated at a rate of $50 an hour. What effect would these disparities have on a court-awarded fee system?

ANSWER: The great disparity in fee awards, especially when that disparity exists within the same court and for similar cases, makes the fee system seem irrational and unfair. As one commentator has suggested,

> the enormous variation in fee awards cannot be explained in terms of the differing facts and circumstances from case to case. Rather, it reflects the dissimilar manner in which various courts approach the job of fee setting. As a result, from court to court and from case to case, attorneys and litigants are subjected to widely differing treatment.

Berger, Court Awarded Attorneys' Fees: What Is "Reasonable"?, 126 U. Pa. L. Rev. 281, 292 (1977). See also Laffey v. Northwest Airlines Inc., 746 F.2d 4, 12 (D.C. Cir. 1984). This irrationality has generated an excessive amount of litigation over the proper fee amount, sometimes involving more attorney time than the underlying lawsuit. See Ashton v. Pierce, 580 F. Supp. 440, 444 (D.D.C. 1984) ("Often these fee requests consume more court time and involve more paperwork than the underlying case"). A more rational approach would allow both courts and parties, as the Supreme Court has admonished, to avoid a "second major litigation" over the scope of attorneys' fees. Hensley v. Eckerhart, supra, 461 U.S. at 437.

Finally, arbitrariness in awarding fees hampers accurate forecasting of what rate ultimately will prove "reasonable." As a result, it reduces the likelihood of settlements because the parties cannot predict what the ultimate size of the fee award will be. See Laffey v. Northwest Airlines, Inc., supra, 746 F.2d at 21.

QUESTION 4: You have limited the amount that the Federal Government may compensate outside counsel to the same $75 per hour rate set by the bill for prevailing party awards. Would there be constitutional problems with a federal law attempting to dictate to the states the level at which they may compensate outside counsel?

QUESTION 5: Are there also policy reasons against setting a rate at which states may compensate outside counsel?

ANSWER: Certainly we believe there is some constitutional question whether Congress could find among its enumerated powers the authority to dictate to the states the level at which they may compensate outside counsel. The reasoning in the recent Supreme Court case, Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985), and the Court's earlier decision upholding the imposition of federal price control regulations against the states, Fry v. United States, 421 U.S. 542 (1975), do not necessarily resolve all concerns regarding the authority of Congress in that respect.

Of course, whether or not Congress has the power to prescribe limits on the amount states can pay their outside counsel, we believe that there are many weighty reasons why the federal government, as a matter of policy, should not intrude so deeply on the ability of state and local governments to manage their own affairs in this area. Federalism is at the core of our constitutional system, a principle that is reflected not just in the Tenth Amendment, but throughout the structure of our Constitution. Thus, the federal government must strive to preserve state sovereignty and to refrain from "overreaching." See Garcia, supra, 105 S. Ct. at 1018. We believe that for Congress to dictate to the states the limits at which they may compensate outside counsel would constitute just such overreaching. Indeed, if the states are to "serve as laboratories for social and economic experiment," see New State Ice Co. v. Liebermann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), we should defer to their judgment in matters relating to the provision of needed services at a reasonable cost on terms acceptable to their voters.

In any event, we believe that the imposition of heavy-handed federal restrictions on the ability of state and local governments to compensate outside counsel is unnecessary as a practical matter. State and local governments already have a number of external constraints to deter freewheeling or unnecessary spending. For example, states and localities generally must operate within strict budgetary limits, and their officials must weigh the cost of litigation in every case. Moreover, local voters serve as a forceful political check on excessive spending.

QUESTION 6: Will a $75 an hour rate be sufficient to attract competent counsel to meritorious cases nationwide?

ANSWER: As I stated earlier, courts across the country have awarded fees at a rate of $75 or less to attorneys who brought suit under various fee-shifting statutes (see Tables B, C and D attached to my testimony). These cases demonstrate that plaintiffs can attract competent counsel for $75 an hour or less -- even in high-priced markets like the District of Columbia. At this rate, attorneys who billed 1,500 hours a year would earn $112,500 annually.

As I also stated, this $75 hourly rate is based on the Equal Access to Justice Act, 28 U.S.C. §§ 504 and 2412(d). There, Congress recently reauthorized a general limit of $75 an hour as necessary and appropriate to forestall skyrocketing legal costs, yet adequate to ensure quality representation. Experience under the EAJA demonstrates that a maximum rate of $75 per hour for attorneys' fee awards has been sufficient to attract competent counsel nationwide.

In conclusion, I appreciate the opportunity to respond to these questions and to restate the Department's position in support of S. 1580. The Department would be pleased to provide further information during the consideration of these important issues in this Congress.

Sincerely,

D. Lowell Jensen
Deputy Attorney General

FOOTNOTES

1/ S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976); H. Rep. 94-1558, 94th Cong., 2d Sess. 9 (1976). *See also Coop v. City of South Bend*, 635 F.2d 652, 655 (7th Cir. 1980) (the fee-shifting statutes were not designed to "create a . . . fee bank to be liberally drawn upon by lawyers for their own welfare").

2/ *City of Riverside v. Rivera*, 763 F.2d 1580 (9th Cir.) (as amended Aug. 5. 1985), *cert. granted*, 54 U.S.L.W. 3270 (U.S. Oct. 21, 1985) (No. 85-224). *See also City of McKeesport v. Cunningham*, 753 F.2d 262 (3d Cir.), *petition for cert. filed*, 54 U.S.L.W. 3060 (U.S. May 14, 1985) (No. 84-1793).

3/ *See Grendel's Den v. Larkin*, 749 F.2d 945, 952-53 (1st Cir. 1984) (the presence of two top echelon lawyers at each proceeding found to be unnecessary); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) ("where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time").

4/ *See Grendel's Den*, *supra*, 749 F.2d at 953-54 (66 hours preparing for oral argument that would last less than one hour for both sides and 55 hours preparing a 17-page petition for re-hearing held excessive); *Ramos v. Lamm*, 713 F.2d 546, 554 (10th Cir. 1983) ("If the inexperience of counsel requires the unusually large number of hours, the adversary should not be required to pay more than the normal time the task should have required"); *Gagne v. Maher*, 594 F.2d 336, 345 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980)(trial court did not commit error by disallowing half the hours worked where the issues were relatively simple and most attorneys would not have spent as much time on the case); *Attorney Fee Petitions* at 34 ("Hours spent due to inexperience or mere ineffective effort may also be deemed unreasonable").

5/ *See In re Continental Illinois Securities Litigation*, 572 F. Supp. 931, 933-34 (N.D. Ill. 1983).

6/ *See Bonner v. Coughlin*, 657 F.2d 931, 934 (7th Cir. 1981) ("[t]he amount recovered may sometimes indicate the reasonableness of the time spent to vindicate the right violated"); *Scott v. Bradley*, 455 F. Supp. 672, 675 (E.D. Va. 1978).

7/ Under 28 U.S.C. § 1927, for example, a court may order an attorney who multiplies court proceedings unreasonably or vexatiously to pay the excess "costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Several provisions of the Federal Rules of Civil Procedure also address this question. Rule 11, which was revised in 1983, provides that:

> The signature of an attorney or party constitutes a certificate by him that . . . the pleading, motion, or other paper . . . is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to

> the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 37 also provides for sanctions against parties who abuse the discovery process. Finally, Rule 68 provides for an award of costs against a plaintiff who refuses a settlement offer but does no better after trial.

In sum, it would be anomalous not to address the issue of unreasonable delay or excessive tactics in the context of awarding attorneys' fees when the Federal Rules and the United States Code acknowledge this concern in all other phases of litigation.

8/ See also Rule 3.2 of the ABA Model Rules of Professional Conduct ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client") and the Comments to Rule 3.2, which provide that "[r]ealizing financial or other benefit from otherwise improper delay in litigation [is] not a legimate interest of the client."

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General
Washington, D.C. 20530

December 31, 1985

The Honorable Orrin G. Hatch
Chairman, Subcommittee on the
  Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Hatch:

I am pleased to respond to your letter of November 22, 1985, which attached written questions posed by Senator Grassley concerning S. 1580, the Legal Fees Equity Act. These answers should be read together with my written statement submitted on October 8, which discusses these issues in greater detail, and with the Section-by-Section Analysis of S. 1580 prepared by the Department of Justice in proposing S. 1580. They also should be read together with my response of November 19, 1985, to questions posed by this Subcommittee.

Before specifically addressing Senator Grassley's questions, I would note that his questions all relate to purported differences between S. 1580 and the Equal Access to Justice Act ("EAJA"). S. 1580, as drafted, however, would apply not merely to the EAJA, but to all federal statutes that provide for an award of attorneys' fees against federal, state, or local governments. The intent of the bill is to treat all actions for which attorneys' fees may be awarded against the government the same. Nevertheless, in recognition of the unique aspects of the EAJA, § 4(e) specifically exempts EAJA awards from certain requirements of the bill that would alter the balance struck by Congress in enacting and amending the EAJA.

For convenience, each of Senator Grassley's questions is printed together within the response.

> QUESTION 1: Why are fee entitlement standards proposed in S. 1580 different from and more stringent than the "prevailing party" standards currently applicable under the EAJA?

ANSWER: At the outset, I must note that the EAJA, in fact, has a stricter standard for entitlement to attorneys' fees than other fee-shifting statutes: not only must the party seeking fees prevail on the merits under the EAJA, but the court must find that the government's position was not "substantially justified." See 28 U.S.C. 2412(d)(1)(A). S. 1580 would not impose such a requirement.

More specifically in response to the question, however, S. 1580's definition of "prevailed on the merits" focuses on whether the party was successful on significant issues in the controversy and obtained significant relief in connection with these issues. This is intended to be a more flexible standard than some formulations of this term. Cf. Taylor v. Sterrett, 640 F.2d 663, 669 (5th Cir. 1981) (a prevailing party for attorneys' fees purposes "has been successful on the central issue" in the case, and has "acquired the primary relief sought"). Under S. 1580, the relief sought need not be "central," but must be significant in terms of the result sought by the party. In this respect, the bill reflects the first part of the test enunciated by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) ("plaintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit") (emphasis added).

This bill differs, however, from the second part of the Hensley formulation. The language of Hensley is subject to an overly expansive reading, as the district court did in Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354 (D.D.C. 1983), rev'd, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 3488 (1985). There, the district court found the plaintiffs to be prevailing parties for all purposes even though they in fact failed to achieve the results sought in important respects.

The purpose of the bill is to state more precisely that the relief obtained by the party must be significant, not merely "some of the benefit" the party sought. The relief obtained should be significant in terms of the result sought by the party in bringing the suit. Cf. Hensley v. Eckerhart, supra, 461 U.S. at 440 ("A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole"). We believe that the standard set forth in S. 1580 provides a greater measure of uniformity in determining success on the merits, and in reducing ambiguity and the incentive for litigation.

> QUESTION 2: Why are the fee entitlement standards proposed in S. 1580, as they affect parties who succeed through out-of-court settlements, more stringent than or at least different from the "prevailing party" standards currently applicable under the EAJA?

ANSWER: This question is premised on the erroneous assumption that S. 1580 appears to propose "new 'prevailing party' standards which would bar fee entitlement for parties who succeed through settlement." (p.3). In reality, however, the bill is intended to codify existing case law providing that attorneys' fees may be awarded in cases where the litigation is terminated by settlement agreement as long as the party seeking fees has prevailed on the merits of the relief sought. See, e.g., Ward v. Schweiker, 562 F. Supp. 1173 (W.D. Mo. 1983). S. 1580 defines "prevailed on the merits" as "having obtained a final decision in which the party has succeeded on a significant issue or issues in the controversy and obtained significant relief in connection with that issue or issues." It also defines "final decision" to include "a judgment or order obtained by a party dismissing the proceeding with prejudice pursuant to a settlement agreement."

QUESTION 3: Why are the fee entitlement standards proposed in S. 1580, as they affect parties who succeed where their legal actions serve as catalyst, more stringent than or at least different from the "prevailing party" standards currently applicable under the EAJA?

ANSWER: This question is also premised on a mistaken assumption that S. 1580 proposes "new 'prevailing party' standards . . . which would bar fee entitlement for parties whose actions serve as catalysts, and which thus would be inconsistent with the intended interpretation of the EAJA." Under existing law, a party will be held to be a prevailing party and entitled to recover attorneys' fees and related expenses or costs even if the claim has been mooted, if it is found that the suit was a "catalyst" for the change of policy that rendered the claim moot. See, e.g., Maher v. Gagne, 448 U.S. 122, 129-30 (1980). Section 8(a) of the bill would codify the standard by which pending litigation is determined to have been such a catalyst by allowing a fee award unless the government can demonstrate that the litigation was not a "material factor" in the policy change. This is the standard that is currently being applied by most courts. See, e.g., Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), cert. denied, 449 U.S. 1102 (1981). This provision would ensure that courts do not place undue emphasis on chronology -- that is, the fact that the plaintiff's case was pending when the government changed the policy that mooted the suit. Under this provision, governments would be encouraged to carry out planned policy reforms without fear of incurring liability for fees in pending suits, but would still be liable for attorneys' fees unless the government could prove that the suit actually was not a "material factor" in the policy change.

QUESTION 4: Why are the standards for allowing interim fee entitlement as proposed in S. 1580 different from and more stringent than the interim fee entitlement standards currently applicable under the EAJA?

ANSWER: The bill would preclude so-called "interim awards" of attorneys' fees except where the text or legislative history of an applicable fee-shifting statute indicates that Congress specifically has authorized them. Therefore, interim fee awards still may be allowed under the EAJA where appropriate. See H.R. 5612 Conf. Rep. No. 96-1434 at 22 (fees may be "appropriate where the party has prevailed on an interim order which was central to the case"). See also S. 265 Rep. No. 96-1418 at 11, 18; S. Rep. No. 253 at 7. Of course, such interim awards should be made only "to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." Hanrahan v. Hampton, 446 U.S. 754, 757 (1980)(per curiam).

In Hanrahan, the Supreme Court noted that the legislative history of 42 U.S.C. § 1988 cited two cases 1/ as examples of appropriate circumstances for interim fee awards. In both cases, the "party to whom the fees were awarded had established the liability of the opposing party, although final remedial orders had not been entered." Id. at 757. The Court found that the plaintiffs in the suit before it had not prevailed on the merits of any of their claims and reversed the award of attorneys' fees. Id. at 758. Further, the Court ruled that attorneys' fees are not to be awarded for nondispositive rulings regarding matters of discovery, evidence, or procedure. Id. at 759. See also Smith v. University of North Carolina, 632 F.2d 316, 350-51 (4th Cir. 1980).

QUESTION 5: Why is the hourly rate ceiling proposed in S. 1580 different from and more stringent than the hourly rate standards currently applicable under the EAJA?

ANSWER: In the paragraphs preceding this question, Senator Grassley states that "[c]onsistent with Congress' directions, the federal courts in their interpretation of the EAJA have routinely recognized that the increased cost of living subsequent to the October 1, 1981 effective date of the EAJA justifies hourly rates in excess of $75 per hour." 2/ Thus, Senator Grassley concludes, because S. 1580 would not allow a fee award to be computed at rates which "exceed $75 per hour," nor allow for cost of living adjustments, the bill is inconsistent with the EAJA.

First, I would note that, under § 4(e) of S. 1580, the $75 per hour limit for attorney compensation would not apply to awards under the EAJA, 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A) and (d)(3). 3/ Nevertheless, the bill's $75 per hour limit is based on the same amount Congress included in the EAJA. In reenacting the EAJA on August 5, 1985, Congress reaffirmed that a $75 per hour fee cap was necessary and appropriate to forestall skyrocketing legal fee awards, yet adequate to ensure quality representation. When it was reconsidering the Act, Congress clearly had an opportunity to adjust this amount to account for inflation or the increased cost of living. But Congress chose not to. Despite the cases cited by Senator Grassley, it continued to find $75 per hour adequate to attract competent counsel. Thus, I see no reason why parties who are not subject to the potential defense of "substantial justification" also are not adequately compensated at a rate of $75 per hour.

The $75 per hour limit in S. 1580 is intended to assure that fees paid to private counsel in fee-shifting cases are brought somewhat more in line with the salaries of attorneys who represent the government in these cases, while providing sufficient incentive to attract competent counsel. The materials provided with my testimony (Tables B, C, and D) show that courts frequently have awarded fees at an hourly rate of $75 or less to attorneys who brought suits under various statutes. These tables clearly indicate that plaintiffs can attract competent counsel for $75 an hour or less. At this rate, attorneys who bill 1,500 hours a year would earn $112,500 annually.

QUESTION 6: Why is the time limitation proposed in S. 1580 different from and more stringent than the time limitation currently applicable under the EAJA?

ANSWER: Section 7(a) provides that a party seeking an award of attorneys' fees and related expenses must submit an application for such award within 30 days after a final decision by the court or agency from which no appeal is taken." (emphasis added). A final decision on the merits is defined in S. 1580 as a final judgment by the court, or a final order by an agency. Parties may not be awarded attorneys' fees and related expenses by a court or administrative officer if the fee award application is made after the 30 day time limit.

This requirement is intended to be consistent with the jurisdictional time for filing fee applications pursuant to the Equal Access to Justice Act, which was recently amended to define "final judgment" as "a judgment that is final and not appealable." Nothing in S. 1580 suggests that "final judgment" in § 3(10) should be construed differently.

* * *

In conclusion, I appreciate the opportunity to respond to these questions and to restate the Department's position in support of S. 1580. The Department would be pleased to provide further information during the consideration of these important issues in this Congress.

Sincerely,

D. Lowell Jensen
Deputy Attorney General

FOOTNOTES

1/ Bradley v. Richmond School Board, 416 U.S. 696 (1974), and Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

2/ Citing Continental Web Press, Inc. v. N.L.R.B., 767 F.2d 321, 323-24 (7th Cir. 1985); Action on Smoking and Health v. Civil Aeronautics Board, 724 F.2d 211, 218 (D.C. Cir. 1984); Natural Resources Defense Council v. E.P.A., 703 F.2d 700, 713 (3d Cir. 1983).

3/ As I have mentioned, the provisions of the EAJA, unlike other fee-shifting statutes, predicate awards of attorneys' fees not only upon a finding that the party prevailed, but also that the government was not substantially justified in its position. In light of the latter requirement and the EAJA's existing fee limitation provision, it is unnecessary to apply the general fee limitation of S. 1580 to the EAJA.

Senator HATCH. Thank you, Mr. Jensen.

How did the Department arrive at the $75 per hour as the proper incentive levels for meritorious lawsuits?

Mr. JENSEN. The chief impetus, as has been pointed out, is that it has some relevance to the Criminal Justice Act. As I pointed out, the fees have been increased to $60 for in-court, and $40 for out-of-court. It simply adapts to a market, we think, because of that past history of other statutes, which have not had an effect of deterring competent counsel. It compares fee awards with the fees, as it were, in the Government itself—which as pointed out, are in a range of $30 to $60 per hour, even including overhead. We have no problem in obtaining competent counsel in that area. Our bill tries to reach a balance between the need to obtain and stimulate competent counsel and to prevent unreasonable awards and windfall awards in that same arena.

So, on the basis of some historical experience, the bill has simply drawn a line based upon other facts that exist in the fee and salary structures of the Government.

Senator HATCH. The motivation for the higher fee award is not to settle, but to proceed to trial, where the hourly rates are even higher.

Moreover, the Supreme Court in the recent *Chesny* case interpreted the Federal Rules of Civil Procedure to reduce fee awards where the attorney rejects the settlement offer and received no better result at the trial itself.

How does S. 1580 propose to encourage the settlements in cases involving fee shifting?

Mr. JENSEN. Mr. Chairman, you pointed out, as I did in the statement, we recognize that case and the benefits of using that system. The bill specifically enacts the principle of that case as a part of the structure. It would impose a limitation on the fees sought after a settlement offer had been put forward if the subsequent litigation did not result in a better result. We think that the *Marek* v. *Chesny* structure is important in encouraging the early settlement of litigation.

Senator HATCH. S. 1580 contains a provision allowing a judge to reduce the fee award unless a hardship would result This is criticized as making the wrong party pay part of his own legal fees, which may prevent him from getting full redress.

What would be your response to that particular argument?

Mr. JENSEN. That provision is an attempt to come to grips with the whole problem here. Under the fee-shifting statutes, when a party prevails in a suit, there is an independent decision as to the fee that would then be awarded. In some instances, the party obtains only injunctive relief. However, in cases where there has been a money judgment, there is a fund available to seek and stimulate competent counsel to redress the right of the litigant. There is a judgment that is available for payment of some portion of the attorney's fee, and we have simply used that fact to recognize that the litigant could pay a portion of the fee.

Senator HATCH. At this point I would like to place two articles in the record. I think they go along with much of what you have to say.

[Information follows:]

Foul Play in "Public Interest" Litigation

The Joy of Attorneys' Fees

Grover Rees III

AMERICANS ENJOY A uniquely generous and broadminded political culture. One evidence of this is that we reward with a prominent place in our national life organizations whose principal purpose is to sue us. We even pay them to sue us. Under a number of federal laws, most notably the Civil Rights Attorney's Fee Awards Act of 1976, a lawyer who wins a civil or constitutional rights case will be paid not by his client but by the losing party—which, in a successful civil rights suit, is typically some branch of the government.

The lawyer who pursues a career in civil rights litigation is in effect a uniquely unaccountable employee of the taxpayers, paid not to advance his benefactors' objectives but to defeat them. Moreover, the attorney is frequently paid enough for each case he wins to subsidize several unsuccessful lawsuits in which the government is held not to have violated anybody's rights. Whatever its costs in money and in wear and tear on the theory of democracy, this system would seem to have at least one advantage. It should virtually eliminate the chance that anybody who has an arguable civil right to anything will be financially unable to show up in court to assert that right. That is why a recent development in the world of civil rights attorneys' fees is of great interest. For what is apparently the first time, a judge has awarded attorneys' fees against people who had intervened in a case not because they were accused of violating anybody's rights but because they wished to protect their own. (The case is *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 1984.)

In 1978 the city of Akron, Ohio, passed an ordinance requiring the consent of at least one parent before an abortion could be performed on a girl of fourteen years old or younger. The ordinance further provided that parents should ordinarily be notified before an abortion was performed on a girl of seventeen or younger. A lawyer for the American Civil Liberties Union (ACLU), representing a doctor and three abortion clinics, sued to have the ordinance declared unconstitutional. The federal district court agreed with the ACLU, and the Supreme Court upheld the decision. So far, nothing unusual.

There was a further twist, however. Patricia Black and Dr. Francois Seguin, two Akron residents who are parents of teenage daughters, had intervened in the suit on the side of the defendant, Akron. They had argued

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that the notice and consent provisions protected their right to raise their children without undue interference from the clinics. And for having raised that argument, Mrs. Black and Dr. Seguin will have to pay dearly. The ACLU asked and got the district court to make them pick up an as yet undetermined portion of its legal services, the value of which it estimates at $463,000.

The only attention the Akron case has received in the press or even in the legal profession has been as a chapter in the ongoing struggle between the "pro-life" and "pro-choice" movements. The holding that attorneys' fees should be awarded against individual intervenors, however, has implications far beyond the context of abortion. If followed in other cases, this holding could make it prohibitively risky for the beneficiaries of *any* law or administrative regulation to defend in court the rights to which the law or regulation entitles them. This, in turn, will affect the path of the law itself.

The Joy of Attorneys' Fees

In the American legal system, courts generally do not award attorneys' fees to victorious litigants. This rule and its narrow exceptions reflect a recognition of two principles of human behavior: What you subsidize you get more of, and what you penalize you get less of. Thus attorneys' fees have traditionally been awarded against litigants whose claims or defenses are judged to have been frivolous, since we want to discourage people from cluttering up the courts with frivolity. On the other hand, fees are not generally awarded against litigants whose arguments were unsuccessful but not altogether unreasonable.

This means in practice that winners will not be fully compensated, since they will have been forced to pay lawyers in order to obtain what the law has found to be rightfully theirs. The prospect of these uncompensated expenses will even deter some people from asserting claims or defenses that would ultimately have prevailed. But the alternative, which is to saddle the loser with two sets of attorneys' fees, has an even stronger chilling effect. The potential litigant finds it unpleasant enough to retain a lawyer and to agree on a fee, but far worse to face the prospect of having to pay an uncontrollable, open-ended second fee that depends on what the opposing lawyers might eventually persuade the court their work was worth. Indeed, by eliminating the most significant incentive a lawyer has to hold down his fees and expenses—the need to find clients who will pay what he would like to charge—this alternative not only would redistribute but also increase the total cost of litigation. A system in which losers always had to pay attorneys' fees might deter all but the wealthiest and least risk-averse people from asserting what they believe in good faith to be—and what the courts might well hold to be—their legal rights.

Several justifications have been advanced for allowing attorneys' fees in civil and constitutional rights cases. Mostly it is argued that without such a provision individual plaintiffs would far more often be deterred from bringing meritorious claims than governments would be deterred from defending themselves. Governments tend not only to be wealthier than individuals but also to employ staff attorneys at fixed salaries, so that the marginal cost of defending one more suit will ordinarily be lower than the cost to an individual plaintiff of bringing the suit. Moreover, the government official who decides whether to defend or settle a lawsuit will not be paying the costs from his own pocket, so that even the threat of having to pay the attorneys' fees of the opposition will probably have less of a chilling effect on governments than on individuals. Insofar as large fee awards do make them think twice about defending doubtful cases, governments may start to behave more like people.

. . . the federal courts have awarded fees high enough to provide a strong incentive for lawyers themselves to generate litigation.

The 1976 attorneys' fee law and similar statutes, however, have done more than just rectify an imbalance on the supply side of the litigation market. They have also stimulated demand, primarily because the federal courts have awarded fees high enough to provide a strong incentive for lawyers themselves to generate litigation.

(Continues on page 49)

The Joy of Attorneys' Fees

Grover Rees III

(Continued from page 20)

The fee-shifting statutes generally provide that courts may award "reasonable" fees. It is difficult to say what is meant by this, since the most obvious index of reasonability, the market value of the services in question, is by definition unavailable for lawsuits that the client would not bring if he had to pay his own attorney's fees. The Supreme Court has settled on a formula by which an attorney receives *at least* the prevailing hourly rate for attorneys of similar skill and experience in his community for however many hours he can justify having spent on the case. To this base figure there may be added a "bonus" or "multiplier" (typically 25 to 50 percent of the base) for such factors as the attorney's "exceptional" skill, results "exceptionally" beneficial to the client, or the "degree of contingency," which is the risk that the attorney took that he would lose the case and receive no fee at all. This last provision leads to an odd result: a case that challenged such a gross violation of civil rights that it was sure to win would get only the standard fee, while a farfetched claim that won only by a fluke would get the maximum multiplier for its extreme degree of contingency.

The ideal attorneys' fee formula would provide no more and no less than would have been needed to get some competent attorney to take a given case. On paper, the "prevailing rate plus" formula looks as if it might approximate this ideal. Even the contingency factor can be justified on the basis that it makes public interest litigation just as remunerative in the long run as regular litigation with paying clients (though another way to look at it is that it charges the taxpayers, or whoever else the defendant happens to be, even for the lawsuits that are held to be unmeritorious). But in practice, the Court's formula provides windfalls to lawyers by omitting several key factors.

The first dubious assumption in the formula is based on a distorted view of the economic structure of the legal profession. Although the courts have abolished the minimum fee schedules once promulgated by bar associations and enforced by the threat of expulsion from the legal profession, there is still in most communities an understanding among lawyers that it is permissible to charge far more than the median hourly rate but impermissible to charge much less. The result of the suppression of price competition is that the lawyers whose services are least in demand find themselves unable to attract as much work as they would like to do. Although some lawyers respond by discounting their services, they are most likely to do so on an informal case-by-case basis.

The relative rarity and undetectability of attorney competition below the going rate, together with the unlikelihood that a judge will declare an attorney who has just won a case to be unusually unskillful, ensures that few attorneys will be awarded much less than the median fee award. Recently the Supreme Court upheld awards of $95, $100, and $105 an hour—amounts the Court acknowledged to be at least as high as the generally prevailing rate—to New York Legal Aid Society lawyers who were one, two, and three years out of law school respectively. Moreover, although the "like skill and experience" language does not prevent the median from operating as a floor, it does ensure that the ceiling is elastic. For instance, a federal district court recently awarded Harvard law professor Laurence Tribe $275 an hour for several hundred hours of work—a fee subsequently knocked down to $175 an hour by an appeals court on the grounds that he had charged a paying client less than this amount.

Litigating for Love, Not Money

An even more important flaw in the "prevailing rate" theory is that it ignores the nonmonetary benefits that attract many lawyers to such work in the first place. The decision whether to allocate five hundred hours of your time to a personal injury case, a securities transaction, twenty-five divorces, or a suit on behalf of your most cherished philosophical principles that may lead to a landmark Supreme Court decision is an easy one every time, if somebody will pay you $50,000 no matter which you choose.

For many lawyers the choice would be almost as easy if the public interest lawsuit paid only one-half or one-fourth as much as the less interesting and influential work. Many talented attorneys make essentially this choice by working as salaried employees of organizations whose goals they support even though they could make more money elsewhere. If a big cut in attorneys' fees awards were similarly to force self-employed attorneys to choose between material and psychic satisfaction, some would still choose to be full-time public interest lawyers. (To keep things in perspective, even a shockingly large cut in fee awards could still leave them at a figure such as $50 per hour, for what often adds up to several hundred billable hours per case.)

Other lawyers would choose to mix philosophically important litigation with more conventional and lucrative work. Prestigious New York and Washington law firms already choose to do public interest work for social and philosophical reasons. When the law firm wins, it collects from the defendant at rates a bit lower than it usually charges, but far higher than any fee it would actually have charged the plaintiff; when it loses, it spreads the costs among its paying clients. The psychic satisfaction of the attorneys is not without its own palpable economic value to the firm: many firms attract top law school graduates by advertising the number of hours their attorneys spend on public interest litigation.

Paying for goods you would otherwise get for free is not the worst thing in the world; it may well be a prerequisite to generating more goods of the same kind. The problem, however, is that this analysis assumes some sort of rational constraint on how much new litigation will be called forth. Even if something is underproduced by the unaided market, it may still be undesirable to produce too much of it. This may be even more true of litigation than of other good things.

So long as there is an unexhausted supply of attorneys who will derive a greater sum of financial and psychic satisfaction by bringing new civil rights suits than by doing anything else, there will be no *internal* control on the amount of litigation generated by the fee-shifting statute. The number and scope of tax-supported suits against the taxpayers will continue to increase until society runs out of money or lawyers. Congress seems to have assumed that *external* controls—such as a relatively inelastic supply of clients wishing to bring suit, or of constitutional and civil rights, or of arguments that judges might accept—would operate as an effective limit. But this was a naive assumption.

The paradigmatic civil rights lawsuit that Congress had in mind when it passed the Civil Rights Attorneys' Fee Award Act was that of a poor person who had suffered a shocking violation of his civil rights, but who had suffered little or no monetary damage and could therefore anticipate no large award out of which to pay the fee. In an important public interest lawsuit, however, the civil right being asserted is often on the cosmic rather than the individual scale, and the person who happens to be named as the plaintiff may have had very little to do with initiating the suit. Indeed, the selection of a nominal plaintiff is frequently just one of a number of tactical decisions to be made by the lawyers handling the suit.

If anybody other than the lawyers themselves is helping to make the decisions, it is most often a civil rights or public interest organization. Such organizations, like some government agencies but unlike most individual and business litigants, are motivated more by ideological and long-term strategic factors than by a desire to make money. Like the government, they often litigate through salaried staff attorneys whose hourly wage is a small fraction of the "prevailing rate," and they benefit from other economies of scale that result from litigating many cases with similar facts and legal issues. In the award of attorneys' fees, however, these litigating groups get treated not like government agencies but like individual attorneys competing on the open market, which means that they are compensated at an hourly rate much higher than their cost per hour.

Under the prevailing-rate-plus formula, the number of hours a litigant bills tends to approach the maximum number a reasonable attorney could justify spending. By aiming for the upper limit of reasonableness, the public interest organization not only maximizes its receipts in the case at hand but also puts pressure on the ceiling for future cases. In effect, it becomes a cost-plus contractor that maximizes

In effect, [the plaintiff] becomes a cost-plus contractor that maximizes profits by maximizing costs. The system that produces $1,600 socket wrenches at the Pentagon works just as well in producing million-dollar civil rights lawsuits.

profits by maximizing costs. The system that produces $1,600 socket wrenches at the Pentagon works just as well in producing million-dollar civil rights lawsuits.

Civil rights groups churn the profits from successful litigation back into more litigation. Because of the disparity between what it costs them to litigate a suit and what they are awarded when they win, they need to win only a few suits in order to initiate many new ones. And if they can win the same percentage of this year's cases as they did of last year's, their litigation budget will expand geometrically.

The Rights Industry

This system—essentially an entitlement program for lawyers—has enabled individual rights litigation to grow into a big business. But it poses much more than just a budgetary problem. If the only effect of excessive litigation were to refine the legal system, to call forth ever-smaller incremental steps toward some agreed-on goal of perfect justice, it would be at worst another case of spending too much on a good thing. The problem is that every controversial issue has at least two sides. When a court grants an asserted individual right to one party, it is more often than not rejecting an individual right claimed by another party.

A government making laws and a rights group selecting clients are both faced with a bewildering array of competing claimants. They must consider the putative rights of merchants and consumers, of pregnant women and unborn children, of people who want to swim in the nude at the public beach and parents who do not want their children seeing naked people. When they decide between these claims, or attempt to balance them, they are making political choices between philosophies of government. Thus, most "individual rights" litigants are best understood not as defenders of a generic "individualism" against some other philosophy, but as advocates who happen to promote their own political philosophies in terms of a resulting set of individual rights. In the case of most litigant groups dating back to the 1960s or earlier, the choice of rights coincides with the policy preferences of the left; in the case of a small number of more recent groups, it coincides with the preferences of the right.

The public interest law establishment frequently asserts that its choices among rights are based not on ideology but on the U.S. Constitution. This argument, however, is circular; it is another way to say that professional civil libertarians have come to regard almost all of their political opinions as constitutional rights. As most any candid civil rights lawyer will tell you, few of these rights were contained in the written Constitution that was ratified in 1790 or in its amendments. Rather, they are part of the "living constitution" that has been enacted by the federal courts during the last thirty years. The courts, in turn, have defined the contours of the living constitution largely according to suggestions made by the ACLU and its sister organizations. This is a function partly of the predisposition of most federal judges, but perhaps more importantly of what is called litigation pressure.

The Role of Litigation Pressure

Litigation is not an abstract idea. It is a thing. It has attributes very much like mass, volume, density, speed, and acceleration. Other things being roughly equal, if Position A is urged in a thousand lawsuits and Position B in only ten, the courts will eventually adopt Position A.

Year in and year out lawyers for public interest groups bring thousands of lawsuits urging the courts to incorporate certain ideological positions into the Constitution. These cases are selected from among many more thousands of possible cases for their relatively strong fact situations, appealing plaintiffs, and unappealing defendants. Every effort is made to bring pioneering suits in the judicial districts with the most sympathetic judges, and even then a civil rights organization may be willing to lose many cases in order eventually to win one big one.

When a single federal district judge declares the existence of a new constitutional right, law review articles appear proclaiming the landmark status of the case. In the next round of lawsuits the landmark case and the law review articles are cited as authority. More cases are won. By the time the Supreme Court considers the question, the new civil right is practically an established part of the legal landscape. Even if the justices refuse to go along, a public interest group is unlikely to regard its defeat as final. More lawsuits will be brought (with slightly different fact patterns to distinguish them from the Supreme Court's decision) in order to win more victories in lower courts, more law review articles and newspaper editorials, and an eventual reconsideration by the Court.

It is not unreasonable to ask what the state and local governments are doing while their laws and ordinances are gradually being transformed into violations of the Constitution. There are many answers. Some government lawyers lose because they are simply not as competent as the opposing public interest lawyers. Others concede the fundamental claim advanced by the opposition and try to carve out a narrow exception for their clients, either because they are personally sympathetic to the opposing position or because they are more concerned with winning one case than with the eventual progress of the law.

Even when the government decides to fight, it labors under certain disadvantages. Government lawyers, unlike those who work for civil rights or public interest groups, generally take lawsuits as they find them with the plaintiffs, defendants, facts, and judges already selected. It is much harder for hundreds of governmental entities to coordinate litigation strategy —to attempt to ensure, for instance, that the cases that go to the Supreme Court are strong ones for the government and that they are argued by the best attorneys available—than it is for the organizations that bring the suits.

Moreover, once the courts have decided to regard one side of the case as the "individual rights" side and the other as the "government interests" side, a number of procedural and substantive rules combine to make it difficult for the government to prevail—even when the government's interest is in protecting some people from injury by others. Government lawyers themselves contribute to this situation: even when they draw the court's attention to the individual interests that the challenged law protects, they almost always argue only that the Constitution permits the government to protect these interests if it so chooses, and hardly ever that the Constitution requires such protection.

Finally, once the public interest law establishment wins a single case in the Supreme Court it has usually won for good, since government lawyers will generally advise their clients to comply with the decision rather than relitigate what seems to be a lost cause. So the law moves gracefully in the desired direction, riding the crest of the litigation glacier, with only an occasional lurch the other way.

Silencing the Opposition

The effects of litigation pressure might be very different if it came from many different directions at once. But for quite a while the groups litigating for civil and constitutional rights were not at all evenly distributed along the ideological spectrum; nearly all came from the left. During the last few years, however, it seems to have dawned on conservatives that a single defeat in federal court can cancel out many legislative victories. Dozens of litigating organizations have sprung up to press more conservative viewpoints.

If the trend toward diversification among individual rights litigation groups were to continue, the organizations on the left would have to devote substantial resources to relitigating old cases and defending their fundamental assumptions about which individual rights are to be protected, with a corresponding diminution of the resources available for expansion of the constitutional frontiers. This is where Mrs. Black and Dr. Seguin come in. They will serve as an example for others who might think of asserting in court that laws challenged by the established groups should be upheld as valid protections of individual rights.*

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*As another example shows, the public interest law establishment is not at all happy about the prospect of sharing with these upstarts the public interest mantle and the strategic advantages that go with it. A recent article in the *Yale Law Journal* suggests that the Internal Revenue Service should deny tax-exempt status to most business-oriented public interest groups. The author, Oliver Houck, ties his proposal to the charge that the groups have received donations from businesses that benefit from the groups' lawsuits. The irony is that, under Houck's plan, these businesses would still be able to deduct their litigation costs as business expenses. The principal effect of denying tax-exempt status would be to deter contributions from people who do *not* have a palpable financial stake in the outcome. In any case, the article implicitly assumes either that contributors to the other kinds of public interest groups get no substantial benefit financially or otherwise from the lawsuits at issue, or that, even if they do, such self-serving contributions (unlike self-serving business contributions) should not compromise the organizations' public interest status.

Nothing in the Civil Rights Attorneys' Fee Award Act or in any other federal fee-shifting law suggests that such laws should be applied against individuals who intervene to defend their own rights. The law provides that the judge "may" award attorneys' fees to any prevailing party other than the United States. Although the law does not explicitly exclude any alternative—not even the possibility that losing *plaintiffs* might be required to pay attorneys' fees to state and local governments—the courts have construed the statute to deny such awards unless the plaintiff's claim was frivolous. A similar construction on behalf of the intervenors in the Akron case would have been fully consistent with the purposes of the law: to encourage people to assert their rights and to compensate for the advantages governments have over individuals.

In a few cases, such as when a business enterprise is found to have discriminated in employment, the civil rights law clearly permits the awarding of attorneys' fees against non-government defendants. But in these cases it is the wrongful acts of the defendants that the plaintiffs claim to have violated their rights in the first place. When people intervene in a lawsuit to defend the constitutionality of a law, their only offense is to argue in court that their own rights are at least as important as those of the plaintiffs. To treat the assertion of rights in court as if it were itself a civil rights violation contravenes some of our most cherished notions—including those that motivated the passage of the civil rights attorneys' fee law.

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In two earlier abortion cases where the facts were similar to those of the Akron case, federal judges had refused to levy attorneys' fees against parents and other individual intervenors. In effect, the courts treated losing intervenors just as they have always treated losing plaintiffs. The earlier courts had also noted that the presence of individual intervenors had given the courts a more accurate picture of the controversy than if only the government had defended the law. But the Akron judge summarily rejected such reasoning. He noted that the intervenors had caused the plaintiffs' attorneys lots of extra work by choosing to intervene as parties, and that if they had just wanted to suggest helpful arguments to the court they could have done so in an amicus curiae brief. There is a certain tension between these arguments, since the only reason the parties' attorneys do not have to spend much time answering arguments in amicus briefs is that such briefs are notorious for not being read by judges. Moreover, all kinds of parties cause opposing parties' attorneys lots of work year in and year out in all kinds of lawsuits, and only in exceptional circumstances are they hit with attorneys' fees as a result. Those exceptions, as we have seen, sometimes provide that both sets of fees must be paid by an unusually guilty or an unusually powerful party. Even assuming that the ACLU and its clients can be analogized to David, it does not make much sense to designate Mrs. Black and Dr. Seguin as Goliath.

The Akron judge's reasoning presents an unpleasant choice to people who believe a challenged law protects their rights. If they stay out of the lawsuits, they risk losing whatever rights the law affords without ever having had a day in court. Even the most competent government lawyers may not adequately represent the interests of those who are protected by a law, because the state's interests are never precisely identical to those of any one group of citizens. The state will be reluctant to advance arguments that might win a case but cause it to lose some other case or that might make state officials look bad in the eyes of some voters. But if the beneficiaries of the law appear in court to make these arguments for themselves, they now risk bankruptcy.

No such unpleasant choices are imposed on those who choose to challenge a law, even when the only difference between challengers and defenders is that the defenders happened to win the political contest that preceded the judicial one. Mrs. Black and Dr. Seguin, even if they had won their court battle, would not have been able to recover their attorneys' fees from the abortion clinics. The asymmetry stems from the court's assumption that anybody who is defending a state law or a local ordinance against constitutional attack cannot really be on the side of individual rights.

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This is a disturbing assumption not only because it reflects a certain cynicism about democracy but also because it tends to be self-validating. The imposition of severe penalties on people who appear in court to defend their own rights under a law will perpetuate the present artificial situation in which the courts see individual rights on only one side of each case, while designating the other side as a mere governmental interest. The presence of flesh-and-blood people on both sides of civil rights cases makes it more awkward for a court to indulge in this legal fiction. Intervenors like those in the Akron case therefore pose a potentially important threat to the hegemony of the current public interest establishment, since the individual rights/governmental interests dichotomy has been crucial to many of the most important victories its constituent organizations have won over the years.

Bad News for Defenders of Laws

Congress is now considering comprehensive legislation to curb the excesses of the federal attorneys' fee industry. One proposal under consideration would effectively overrule the Akron case by making it clear that fees can be awarded only against litigants who are found to have violated someone's rights. Assuming that the Akron case is not overruled by Congress or by a higher court, however, the public interest law movement can be expected to portray it as a landmark and urge its application in other contexts.

The Akron ruling is technically an interpretation only of the Civil Rights Attorney's Fee Award Act of 1976, but its reasoning is equally applicable to many other federal fee-shifting statutes that provide for "reasonable attorneys' fees." The parties at risk in these cases will be people who intervene to defend state and local government conduct; where the federal government is the principal defendant, on the other hand, the language of the usually applicable statute is more precise and harder to apply against intervenors.

Even if the Akron precedent is not applied to any fee-shifting statutes other than the civil rights law, however, it may apply to many private litigants who would not otherwise be forced to pay for their opponents' attorneys. A recent Supreme Court decision has expanded the term "civil rights" beyond its traditional context to mean *any* right secured by the Constitution *or by any federal statute*. Thus the law could be applied to businesses or civic associations who might wish to defend local zoning laws against attack on constitutional or federal statutory grounds, or to hunters and fishermen who support state interpretations of the federal fish and wildlife laws less draconian than those sought by environmentalist groups, or to private schools or teachers who intervene to defend their interest in any of the numerous laws that apply to them, or to anyone who benefits from a state program funded in part by the federal government.

It is even conceivable that the Akron case could come back to haunt the ACLU itself. Some laws, after all, do protect rights that are important to liberals, and conservative lawsuits could place the beneficiaries of such laws in exactly the spot in which the ACLU managed to place Mrs. Black and Dr. Seguin. It is much more likely, however, that attorney fee awards against individual intervenors would prevent right-of-center litigation groups from emerging as serious competitors to the established organizations on the left. In the first place, conservatives have generally been more successful than the left-of-center public interest organizations have been in securing legislative protection for the rights they believe to be important, so that they have more laws to defend and fewer to attack. The left, on the other hand, has done far better in court. Even if new judicial appointments and litigation pressure from conservative groups should eventually reverse the leftward drift of federal judicial decisions, such a reversal would necessarily be gradual, and it would start from sets of precedents that define individual rights more or less according to the specifications of the ACLU.

In the first few years of any effort to get the courts to accord constitutional status to the rights they regard as important, conservatives could expect to lose far more cases than they would win. But their only alternative is to confine themselves to defending the power of legislatures to protect these rights, which is what got Dr. Seguin and Mrs. Black into so much trouble in the Akron case. This is quite a discouragement; if during the early history of the ACLU its clients had been routinely exposed to liability for many thousands of dollars in attorneys' fees, it would have had fewer clients.

Finally, the public interest establishment is in a better position than the newcomers to absorb any losses they might incur. The litigation budget of the ACLU alone is many times larger than the combined budgets of all the conservative groups that litigate on "social" issues. The established groups get institutional support not only from blue-chip law firms and large foundations but even, ironically, from various levels of government. In the Akron case, for instance, the ACLU lawyer was also the director of the "litigation clinic" at a state university law school. His services were donated (with out-of-pocket expenses being advanced by the abortion clinics) with the stipulation that the law school and the ACLU would share equally in any attorneys' fee award.

THE FINANCIAL ADVANTAGES that the public interest establishment enjoys over its adversaries, like the fact that it starts out with more of its positions having been designated by the federal courts as the "true" individual rights positions, is attributable in no small part to the fact that it has been on the job longer. In individual rights litigation as in any other market, barriers to entry help the established enterprises. If the costs of setting up business can be made steep enough, competition can be eliminated and monopoly power established. The Akron case—in which a law designed to encourage people to assert their rights in court has been transformed into a bludgeon against the assertion of rights that are not currently fashionable—suggests that the incumbent monopolists are in a predatory mood. ■

CITIZEN SUIT ATTORNEY FEE SHIFTING AWARDS: A CRITICAL EXAMINATION OF GOVERNMENT-"SUBSIDIZED" LITIGATION*

BRUCE FEIN†

I

INTRODUCTION

> We think the District Court [in declining to award fees] incorrectly focused its attention on the outcome and practical effect of the litigation, to the exclusion of a more relevant consideration—whether the suit was the type that Congress intended to encourage when it enacted the citizen-suit provision . . . . The attorneys' fee feature was offered as an inducement to citizen suits, which Congress deemed necessary; and if the hope Congress had for such suits is to become a reality, decisions on fee-allowance cannot make wholesale substitutions of hindsight for the legitimate expectation of citizen plaintiffs.[1]

The court in *Metropolitan Washington Coalition for Clean Air v. District of Columbia* thus reasoned that the "public interest" aspect of a lawsuit filed to prevent air pollution was sufficient to justify an award of fees based on the attorney fee provision of the statute under which the suit had been brought, despite the fact that the plaintiffs did not prevail on the substantive issues in the case.[2] Although the Supreme Court subsequently decided in *Ruckelshaus v. Sierra Club*[3] that a court may not award fees when a plaintiff loses on all issues,[4] the Court's rationale leaves little comfort for those who are justifiably concerned that decisions like *Metropolitan Washington Coalition* are examples of an endemic problem in recent federal legislation: permitting the federal judiciary to decide "policy" and to interfere in the daily operations of the executive branch. The Supreme Court's decision that the plaintiffs were precluded from recovering attorney fees because they did not prevail on *any* issue creates an insubstantial and ineffective obstacle to fee awards against the federal government.

Attorney fee shifting is the process of allocating the cost of services provided by attorneys among the parties to a lawsuit. Traditionally, parties pay their own

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† General Counsel, Federal Communications Commission. The views expressed in this article are the views of the author and do not necessarily represent the position of the Federal Communications Commission.

[1] Metropolitan Washington Coalition for Clean Air v. District of Columbia, 639 F.2d 802, 804 (D.C. Cir. 1981).

[2] *Id.*

[3] 103 S. Ct. 3274 (1983).

[4] *Id.* at 3281.

attorney fees in the United States.[5] In the past twenty years, however, Congress has enacted numerous statutes which change the traditional approach by authorizing "citizen suits." Briefly stated, citizen suits are statutorily created causes of action brought by private individuals or groups, who need not have suffered personal harm, against federal agencies challenging the proposed or actual implementation of an administrative policy on the basis of its alleged inconsistency with authorizing legislation. These statutes all permit potential recovery of attorney fees and contain similarly phrased fee shifting provisions.[6] The typical statutory provision provides that "[i]n any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate."[7]

These attorney fee shifting schemes, establishing a low threshold for a private party's entitlement to fees, have far-reaching consequences for our government and its efficient operation. This article does not analyze statutes that permit fee shifting in other actions against the government or among private parties.[8] Accordingly, all types of civil rights actions, constitutional torts, and section 1927 awards of fees (awarded in cases of vexatious litigation and charged against the vexatious litigant's counsel) are not addressed.[9] The limited inquiry chosen here is for the purpose of uncovering the unique problems presented by fee shifting in citizen suits. The implications of attorney fee shifting provisions in citizen-suit legislation are far broader than the simple allocation of the costs of litigation. Citizen suits and their concomitant fee provisions empower the courts to decide the merits of challenges to administrative determinations and to award attorney fees and other litigation expenses when the circumstances are deemed "appropriate." When a court awards fees in a citizen suit, unlike other types of litigation, the impact of the award extends well beyond the parties to the case. Because potential citizen-suit plaintiffs ordinarily have not incurred any direct personal injury, the strongest incentive to sue is the attractive likelihood of recovering litigation expenses. As a result, awards in earlier citizen suits, through fee shifting precedent, often determine whether or to what extent subsequent suits will be initiated.

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[5] Not long ago, the Supreme Court recognized that "[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). The origins of this rule precluding fee awards to the prevailing party lie in the common law. *Id.* *See also* Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9.

[6] Toxic Substances Control Act, 15 U.S.C. § 2618(d) (1982); Endangered Species Act, 16 U.S.C. § 1540(g)(4) (1982); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d) (Supp. V 1981); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c) (Supp. V 1981); Clean Water Act, 33 U.S.C. § 1365(d) (1976); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g)(4) (1976); Deepwater Port Act, 33 U.S.C. § 1515(d) (1976); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) (1976); Noise Control Act, 42 U.S.C. § 4911(d) (1976); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d) (1976); Powerplant and Industrial Fuel Act, 42 U.S.C. § 8435(d) (Supp. V 1981); Ocean Thermal Energy Conversion Act, 42 U.S.C. § 9124(d) (Supp. V 1981); Solid Waste Disposal Act, 42 U.S.C. § 6972(e) (1976); Clean Air Act, 42 U.S.C. § 7607(f) (Supp. V 1981); Air Pollution Prevention Act, 42 U.S.C. § 7622(e)(2) (Supp. V 1981); Energy Sources Development Act 42 U.S.C. § 5851(e)(2) (Supp. V 1981); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5) (Supp. V 1981).

[7] Clean Air Act, 42 U.S.C. § 7607(f) (Supp. V 1981) (commonly referred to as section 307(f)). The Supreme Court held in Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983), that the interpretation of section 307(f) controls the construction of the sixteen other statutes cited in note 6, *supra*. *Id.* at 3276 n.1.

[8] This article will not examine, for example such fee shifting provisions as § 304 of the Clean Air Act, 42 U.S.C. § 7604(d) (Supp. V 1981), which permits actions against private parties for violations of the Act and against the federal government for its failure to enforce existing regulations.

Other statutes that permit attorney fee shifting between private parties are also excluded from the analysis. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000a-3 (1976) (permitting attorney fees to be awarded to successful plaintiffs). In total, there are more than 150 federal fee shifting provisions. Ruckelshaus v. Sierra Club, 103 S. Ct. 3274, 3276 (1983).

[9] Whether a distinction should be drawn between citizen suit attorney fee shifting provisions and fee provisions in other statutory schemes is unclear. In Hensley v. Eckerhart, 103 S. Ct. 1933, 1937 (1983), the Supreme Court permitted an award of fees to a party that did not succeed on every claim under a standard which permitted fee awards only to prevailing parties. *See also* 42 U.S.C. § 1988 (Supp. V 1981). The determination could be interpreted to mean that statutes permitting awards only to prevailing parties and statutes permitting awards when "appropriate," as in the case of citizen suits, are indistinguishable, especially in light of Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983). This conclusion does not, however, appear to be correct.

The Court in *Ruckelshaus* discussed the traditional American rule embodied in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), and then contrasted the operation of fee shifting schemes.

Citizen suits clog court dockets, slow the administrative process, shift policymaking to the judiciary, and undermine the very foundation of the American litigation scheme.[10] These adverse consequences of citizen-suit attorney fee shifting necessarily debilitate the judicial system and blur the lines between the coordinate branches of government. More specifically, citizen-suit fee shifting obviously encourages people to sue the federal government because of the litigation incentive provided by the potential recovery of attorney fees and the lack of any major cost disincentive arising from such litigation because the fee shifting is effectively only one-way—from the government/defendant to the plaintiff.[11] Because of frequent

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Ruckelshaus, 103 S. Ct. at 3276-77 (1983). The Court then specifically described the operation of fee shifting in citizen suits: "[W]e believe that the term 'appropriate' modifies but does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorneys' fees." *Id.* at 3277. Despite the unfortunate word choice of "traditional" to describe other fee shifting schemes, given that the traditional rules do not permit fee shifting, the Court left open the possibility that different standards might apply to citizen suits and other statutes allowing fee shifting, regardless of the fact that *Hensley* could be interpreted otherwise.

[10] The author's research has revealed no studies regarding what the specific effects of citizen suit legislation with generous fee shifting provisions are on the administrative process. But it is simply beyond dispute that the award of attorney fees to private litigants bringing citizen suits in the name of the public interest will drastically increase litigation against federal administrative agencies. Indeed, this is the declared congressional purpose behind these fee statutes. H.R. Rep. No. 218, 95th Cong., 1st Sess. 88-89, *reprinted in* 1977 U.S. Code Cong. & Ad. News 593, 626-27 [hereinafter cited as House Report]. It is also equally clear that as federal agencies become increasingly threatened by private citizen suits they will require greater study and reflection before taking any action that may produce such costly suits. The end result will be a collective regulatory reticence that seriously debilitates and slows the already delay-prone administrative process.

Equally significant, and no less distressing, is the obvious shifting of policymaking from agency experts to judicial dilettantes in the various areas of agency expertise. The numerous fee shifting provisions found in citizen-suit statutes uniformly grant the courts complete discretion to award litigation costs to citizen-suit plaintiffs with only the amorphous notion of bad faith as their guide. *Id.* Liberal awards of fees will increase litigation and thwart agency action. Conservative fee awards will have the opposite result. In either event, the courts will be indirectly affecting, and in some cases determining, the course of agency action.

Finally, no rule is more deeply embedded in our jurisprudence than the principle that each party is responsible for its own attorney fees. *See Alyeska*, 421 U.S. at 247. The rule is so fundamental that the judiciary cannot "jettison . . . [it] whenever the courts deem the public policy furthered by a particular statute important enough to warrant the [fee] award." *Id.* at 263. Citizen-suit fee shifting provisions are manifestly contrary to this paramount principle of litigation.

[11] One reason that fees are shifted in only one direction is that Congress has not been clear as to the appropriateness of fee awards to the government. Although some of the seventeen statutes cited in note 6, *supra*, use the language "to any party," none incorporates the language "including the Federal Govern-

fee shifting, many plaintiffs' attorneys are likely to encourage citizen suit litigation beyond what is socially optimal in pursuit of government-provided attorney fees that may be obtained even when the citizen is not the prevailing party.[12]

The second fundamental problem of citizen suit fee shifting is that it substantially impedes the administrative process. Challenges to government policy, both a goal and a result of fee shifting legislation,[13] delay the administrative process and reduce its efficiency. These challenges appreciably chill the administration of government by deterring administrators from experimenting with new ideas and innovative techniques. As the administrative process is slowed, the costs of implementation increase in real terms (at least in inflationary times) and substantial benefits are lost due to delay. Once lost, the benefits that would have resulted from an earlier implementation of the administrative action cannot be regained.

Finally, the lack of articulated legislative standards in citizen-suit statutes regarding the appropriateness of fee shifting tranfers policymaking from Congress to the courts. Although enabling legislation often delegates some discretion to administrative agencies (in general terms rather than delineating the particular areas in which citizen suits are available), such a legislative choice with respect to fee shifting leaves far too much policymaking discretion to the judiciary—the nonpolitical branch of government. Consequently, unelected and therefore politically unaccountable judges are required to make important policy choices regarding the appropriateness of fee shifting in each case and also to decide without invitation the validity of agency action or inaction at issue in citizen suits. Due to the generalized nature of harms alleged in citizen suits, and the concomitant drastic alteration in standing requirements, courts are increasingly required to give, in effect, advisory opinions because parties often intervene before any actual harm has occurred. Thus, the courts regularly make consequential policy decisions when the potential harm is purely speculative.

In an attampt to alleviate many of the troubling consequences flowing from

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ment," a variation found in the Ship Pollution Prevention Act, 33 U.S.C. § 1910(d) (Supp. V 1981). Notwithstanding that the Ship Pollution Act does not permit citizen suits, the premise for the provision in this Act is the same as that of the statutes permitting citizen suits: parties who come into court may be awarded their attorney fees. The general similarity of the language and legislative history of the Ship Pollution Act and citizen-suit statutes may lead courts to interpret the appropriateness of awards under any of these acts differently depending on slight differences in language. For an implicit suggestion that such similar language contained in different types of statutes will be analyzed comparatively, see United States v. M/V Zoe Colocotroni, 602 F.2d 12, 15 (1st Cir. 1979) (admiralty case). The First Circuit in *M/V Zoe* discussed generally the appropriateness of fee awards to the federal government. The court stated: "Absent specific and express authorization by statute, the United States may not recover its [attorney] fees . . . ." *Id.* The court in also discussed Save Our Sound Fisheries Ass'n v. Callaway, 429 F. Supp. 1136 (D.R.I. 1977), a citizen-suit case, which gave a narrow construction to who may recover attorney fees. *Id.* Thus, judicial interpretation supports the proposition that fee awards will be shifted only in one direction. Concededly it is not yet clear whether all courts adhere to this position; however, a review of the relevant reported authority does not reveal any cases in which fees were awarded to the government.

[12] Attorney fee shifting leads to "mercenary attorneys"—lawyers who make a practice of handling suits with the potential for recovery of attorney fees. These attorneys encourage potential plaintiffs to pursue marginal claims which would otherwise remain unlitigated.

[13] The accepted legislative purpose behind citizen suit fee shifting is "to encourage litigation which will assure proper implementation and administration" of the various remedial statutes under which attorney fee shifting is authorized to further the public interest. H.R. REP. NO. 294, 95th Cong., 1st Sess. 337, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1077, 1416 [hereinafter cited as House Report].

attorney fee shifting legislation, this article suggests a model attorney fee statute. Assuming Congress is unwilling to abandon citizen suits, this model is a practical and moderate alternative to existing citizen suit legislation.

If citizen suits are to continue, they should be required to provide at least one articulable benefit to the public welfare. In the context of administrative agencies, the public interest is served by the disclosure of new information, the discovery of a previously unconsidered important interest, or the demonstration that a government agency has neglected to fulfill its nondiscretionary duties. Other challenges begin to enter the realm of properly delegated discretion and often are no more than another attempt to influence policy, this time, however, through the efforts of the judiciary which cannot and should not formulate regulatory policy. The model statute represents an attempt to further the above goals and is thus premised on the belief that citizen suits should provide a tangible benefit to the public good before the suing citizen is compensated. Although the statute is most appropriately included in the third section of this article on judicial policymaking, it serves as a helpful background when considering the impact of citizen suits on the courts and administrative agencies. Unfortunately, even this moderate approach cannot eliminate the inherent deficiencies of a system which relieves the litigant of the responsibility for the costs of his own litigation. With all this in mind, it is first necessary to examine closely the legislative purpose behind citizen suit-fee shifting. Without understanding the congressional reasons underlying established fee shifting provisions, it is impossible to analyze and weigh the benefits and costs inherent in the one-way fee shifting employed in citizen suits. Once the purpose of permitting fee shifting in citizen suits is clear, the deficiencies and disturbing consequences of relieving litigants of their attorney fees become manifest. It is clear that Congress correctly recognized that administrative agencies cannot be left completely unchecked and unwatched if agency regulation is always to further the public interest. Fee shifting is not, however, the proper remedy. Simply put, citizen-suit fee shifting against government regulatory agencies is a "solution" that is far worse than the problem it purportedly solves.

II

LEGISLATIVE HISTORY AND PURPOSE

With respect to citizen-suit attorney fee shifting, it has been observed that "[n]either legislative history nor case law offers interpretations of the statutory requirement that costs be granted only 'in an appropriate case.' "[14] There is, nevertheless, some legislative history that ostensibly reveals the principal reasons for citizen-suit legislation and their concomitant attorney fee shifting provisions. In establishing citizen suits under the Surface Mining Act,[15] Congress expressly recognized that

> [t]he success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. . . . While

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[14] Carpenter v. Andrus, 499 F. Supp. 976, 978 (D. Del. 1980).

[15] Surface Mining Control and Regulation Act, 30 U.S.C. § 1270(d) (Supp. V 1981).

> citizen participation is not, and cannot be, a substitute for governmental authority, citizen involvement in all phases of the regulatory scheme will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information. In addition, providing citizens access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the act. Thus in imposing several provisions [such as fee shifting] which contemplate active citizen involvement, the committee is carrying out its conviction that the participation of private citizens is a vital factor in the regulatory program as established by the act.[16]

Congress reasoned that because "citizens would be performing a public service" in bringing suits against administrative agencies, "the courts should award costs of litigation to such party."[17] Congress was not reluctant to transfer considerable regulatory policymaking discretion to the courts through citizen-suit legislation because it legislatively presumed without proof that the "[e]nforcement of . . . regulations is not a technical matter beyond the competence of the courts."[18] Nor was Congress concerned that fee shifting would increase the number of meritless claims brought against federal agencies. This lack of concern resulted from the Congressional assumption that "judges are quite capable of dismissing frivolous suits early in the proceedings."[19]

On a more theoretical level, citizen-suit statutes were enacted by Congress to achieve a more desirable, efficient, and ultimately a more socially beneficial allocation of societal resources. Under statutes which concern the pollution of our environment and the conservation of our natural resources, for example, citizen suits have, without exception, been authorized.[20] One reason for this is the economic character of pollution, which in a competitive market economy is known as an externality, a term generally defined as

> a benefit or cost of a market transaction that is neither paid for nor received by those making the transaction, and therefore is not incorporated into the market demand or supply curve. If, for example, a manufacturing plant emits smoke that pollutes a town and causes its citizens to get lung cancer, there is a social cost of the operations of the firm that will not be felt by the firm and will not influence its price or quantity supplied.[21]

Externalities are market imperfections that can be justifiably remedied through government intervention.[22] That is why Congress has enacted so many antipollution and conservation statutes. These statutes attempt to achieve the socially optimum allocation of resources by weighing the quantifiable economic benefits of pollution-producing activities against the damage to human health and the environment caused by pollution and excessive resource exploitation.

To administer and enforce these remedial statutes, Congress has created numerous federal regulatory agencies. Citizen-suit statutes and their attorney fee shifting provisions represent an implicit congressional recognition that these agencies are not immune from error or bias. Under these statutes, rather than relying on federal attorneys general, an unbiased watchdog committee, or some other mechanism of ensuring the appropriateness of agency action, Congress has provided that citizens become "private attorneys general" and "agency watchdogs."[23] It is thus clear that Congress had legitimate economic concerns in mind when it enacted citizen-suit fee shifting provisions. The more difficult question, however, is whether fee shifting is a desirable and appropriate mechanism to control agency regulation and thereby to help to achieve the substantive policy goals under the major antipollution and conservation statutes.[24]

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[16] House Report, *supra* note 10, at 625.

[17] 1972 U.S. CODE CONG. & AD. NEWS 3744, 3747.

[18] *Id.*

[19] House Report, *supra* note 10, at 627.

[20] *See, e.g.*, statutes cited *supra* note 6.

[21] E. GRAMLICH, BENEFIT-COST ANALYSIS OF GOVERNMENT PROGRAMS 19 (1981).

[22] *Id.*

III

CRITIZING CITIZEN-SUIT ATTORNEY FEE SHIFTING

A. Litigious Litigants

The American tradition of litigation dictates that each party should bear its own litigation costs, including attorney fees.[25] Consequently, in the absence of specific statutory authorization, contract, or extraordinary circumstances, the "American rule" requires that a party pay his own attorney fees, even if he prevails.[26] The traditional approach requires that a party considering litigation evaluate the risk of unsuccessful litigation and estimate the costs associated with it when computing the net benefit of further pursuing its claim. This salutary cost/benefit analysis by potential litigants helps prevent improvident, unnecessary, and often costly litigation. It also greatly reduces the pursuit of unfounded or frivolous claims.

Accepting the existence of some fee shifting, an alternative more acceptable than the one way shifts of the current citizen suit scheme is two-way fee shifting. This is an option which the system under consideration manifestly ignores. Under the present fee shifting system, when fees are awarded they are given almost invariably to the private litigant. The courts have indicated that the government is entitled to receive its litigation costs only if a private plaintiff brings a completely frivolous suit.[27] Thus, the courts exacerbate, rather than ameliorate, the inherent deficiencies of fee shifting, encouraging parties plaintiff to litigate by presenting the appealing prospect of receiving a fee award, and the highly unlikely possibility of a penalty in the form of fees assessed.[28]

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[23] Carpenter v. Andrus, 499 F. Supp. 976, 979 (D. Del. 1980).

[24] Of course, this question necessarily subsumes the proposition that attorney fee shifting may in some circumstances be an appropriate mechanism to accomplish substantive policy goals. Although the author is unwilling to accept this questionable proposition, extended discussion of this far more philosophically perplexing question must be left to another article.

[25] *See supra* note 5 and accompanying text.

[26] *Id.*

[27] *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 410, 421 (1978) (fees awarded, in the court's discretion, to defendant in civil rights action, if plaintiff's action was frivolous, vexatious, or brought in bad faith); *see also supra* note 8. Courts discuss the premise of fee shifting as encouraging *private parties* to enforce provisions of federal acts and moving the government towards one goal or another. *See, e.g.*, Save Our Sound Fisheries Ass'n v. Callaway, 429 F. Supp. 1136, 1139 (D.R.I. 1977) ("The possibility of such fees serves as an incentive for private parties to enforce provisions of various statutes deemed too important to be left to the limited enforcement resources of the Justice Department.").

[28] The House Committee on Interstate and Foreign Commerce intended that the statute permit the

An additional problem of fee shifting arises when certain beneficiaries of the citizen suits employ them for personal gain. Because fees are not awarded on the basis of the ability to pay,[29] wealthy plaintiffs and plaintiffs with a pecuniary interest in the outcome[30] may file a citizen suit even though they could otherwise easily afford to undertake such litigation. These wealthy plaintiffs, often environmental or other interest groups advocating their position on an issue, are able to increase immensely the amount of litigation they undertake because the government effectively "subsidizes" their suits.

Attorney fee shifting in citizen suits encourages individuals or groups with nearly frivolous or only marginally colorable claims to challenge the implementation of government policies in court. Unfortunately, the Supreme Court in *Ruckelshaus v. Sierra Club*[31] precluded an award of attorney fees to plaintiffs only when they fail to prevail on any issue: "[w]e hold that, absent *some degree* of success on the merits by the claimant, it is not 'appropriate' for a federal court to award attorneys fees . . . ."[32] Thus, the possibility remains that a party might be successful on only one claim among many and still recover attorney fees.[33] The primary consequence of this rule is that the award of attorney fees may turn solely on the skill of counsel, thereby favoring those plaintiffs whose attorneys are able to win on a relatively unimportant subsidiary issue, even though failing on the merits of the case as a whole. Once the plaintiff prevails on a single issue, it may be argued that the interests brought out in the course of litigation exemplify the type of citizen participation Congress intended to encourage and reward when it established fee shifting.[34]

Unlike the American rule, the current citizen-suit attorney fee structure provides potential plaintiffs few disincentives to litigate. The prospect that plaintiffs will have to pay attorney fees is so remote that few parties would even briefly consider it. To the extent that these suits are litigated in the "public interest," it appears that a court will be reluctant to assess fees against a plaintiff without specific congressional direction. The end result is the troublesome "floodgates"

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award of attorney fees even when the plaintiff was not the prevailing party. House Report, *supra* note 13, at 1416. *See also* Save Our Sound Fisheries Ass'n v. Callaway, 429 F. Supp. 1136, 1145 (D.R.I. 1977) (the awarding of fees to plaintiffs who prevail in citizen suits is the general rule and not the exception).

[29] The economic position of plaintiffs is considered irrelevant with respect to the award of attorney fees under citizen suits. Save Our Sound Fisheries Ass'n v. Callaway, 429 F. Supp. 1136, 1146 n. 15 (D.R.I. 1977). To be sure, "[t]here is no indication that Congress meant to limit . . . [awards of attorney fees] to public interest groups nor is there any basis for disqualifying a party from receiving an award merely because that party is solvent and has a financial interest in the outcome of the litigation." Florida Power & Light Co. v. Costle, 683 F.2d 941, 943 (5th Cir. 1982) (citation omitted).

[30] Florida Power & Light Co. v. Costle, 683 F.2d 941, 943 (5th Cir. 1982).

[31] 103 S. Ct. 3274 (1983).

[32] *Id.* at 3281 (emphasis added).

[33] For a discussion of the appropriateness of awarding fees to "partially prevailing parties," *see id.* at 3279.

[34] *See, e.g.*, Village of Kaktovik v. Watt, 689 F.2d 222, 224 (D.C. Cir. 1982) (plaintiffs lost on all issues and fees were not awarded, but total-loss on issues presented not considered determinative regarding the fee award); Northern Plains Resource Council v. EPA, 670 F.2d 847, 848 (9th Cir. 1982). Surprisingly enough, the plaintiff need not prevail on *any* issue so long as "the case presented novel, complex, and manifestly unclear questions concerning the interrelationships" between the governing Acts. North Slope Borough v. Andrus, 507 F. Supp. 106, 108 (D.D.C. 1981).

problem—a host of suits filed to challenge administrative rulings because of the "no-lose" proposition presented to plaintiffs under citizen-suit statutes. The problem is currently most acute in the environmental area because legislation on this subject has been a focal point of activist groups during the Reagan Administration. The environmental situation highlights the fact that groups no longer in power, in this case the environmentalists, are likely to challenge government action in the courts where their present political powerlessness does not prevent them from pursuing and perhaps achieving their policy objectives. The prospect of recovering attorney fees further encourages these groups to resort to the courts.

The short-circuiting of the administrative process resulting from court challenges to duly enacted administrative schemes is explored in more depth in the next section. For now, suffice it to say that such activities by groups out of power represent a clear circumvention of the political decisionmaking process. It is disturbing to realize that wealthy special interest groups often use the courts as a vehicle to evade the political process altogether by continually challenging administrative determinations under citizen-suit legislation. In addition, by encouraging lawsuits the entire process threatens to overwhelm already overcrowded court dockets.[35] The likelihood of increased litigation grows as administrations more closely aligned with one end or the other of the political spectrum are elected. Even though not all citizen suits are brought because of statutory fee shifting provisions, the existence of such provisions only encourages, as intended by the legislative drafters,[36] the filing of such lawsuits. In authorizing citizen suits, Congress either ignored or simply failed to recognize the serious consequences of citizen-suit legislation for the courts, the administrative process, and society as a whole.

B. Unadministrable Administrative Agencies

The legislative branch legislates and the executive branch implements. This unsophisticated axiom of our government is common knowledge. But since the early days of our Republic a profound change has occurred inasmuch as executive branch action, through its administrative agencies, effectively "legislates" in many areas in which Congress chooses to grant agencies broad authority without specific standards for its use. Administrative rulemaking has evolved to approximate many of the functions of Congress. More recently, a new twist to an old story is evident in the form of citizen-suit statutes in which Congress, by encouraging such suits through pro-plaintiff fee shifting, effectively leaves to the *courts* the task of implementing congressional policy.

This recent shift in the responsibility for implementing congressional policy threatens the administrative process with the impairment of experimentation and the prospect of substantial delay insofar as any individual may file suit to challenge an agency decision.[37] The administrative agencies, which are the subject of the seventeen statutes cited at the beginning of this article,[38] face a number of formidable tasks in implementing the directives of Congress. The agencies must not only interpret legislative intent, but also consider a number of special interests, including industrial and environmental lobbies which attempt to persuade the agency that their interpretation is closest to the actual intent of Congress. An example helps to illustrate the tremendous difficulty encountered by federal agencies in carrying out the legislative commands of the various antipollution and conservation statutes under which citizen-suit fee shifting is typically permitted. The 1977 Clean Air Amendments required the Administrator of the Environmental Protection Agency (EPA) to promulgate

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[35] The following examples of attempts to expedite court dockets reflect a growing concern that courts are backlogged. *E.g.*, 2D CIR. R. 34(g) note (determination by court not to hear oral argument); 4TH CIR. R. 7(b) (disposition of appeal without oral argument), 18 (unpublished opinions). *See also* Nesnite, *Managerial Judges*, 96 HARV. L. REV. 361 (1982); Remarks of Justice Lewis F. Powell, Jr., ABA Division of Judicial Administration, San Francisco (August 9, 1982).

[36] *See, e.g.*, Save Our Sound Fisheries Ass'n v. Callaway, 429 F. Supp. 1136, 1139 (D.R.I. 1977).

> [N]ot later than one year after the enactment of the Clean Air Amendments . . . a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 108(c) [42 U.S.C. § 7408(c)] he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health."[39]

The broad discretion granted the Administrator of the EPA enables him to balance a variety of interests, reach a workable solution to a complex problem, and yet remain within the specific bounds of the applicable enabling legislation. Congress purposely left to the discretion of the Administrator the task of interpreting the congressional mandate because of his perceived experience and expertise. Citizen suits can easily distort this mandate by providing an opportunity for judicial interference where such meddlesomeness is unlikely to result in a solution appreciably better than its administrative predecessor.[40]

A subsidiary, but equally important, result of statutes that authorize citizen interference in the administration of government is the chilling of administrative agency experimentation. As the Supreme Court noted long ago, the science of government is the science of experiment.[41] Congress wisely leaves substantial discretion with the agencies to permit and encourage the fashioning of programs and remedies which effectuate legislative purposes, while taking into account the practical implications and costs of alternative methods.[42] One example of this flexibility is the EPA's "bubble concept" for air pollution emissions control. This policy alternative balances increases in emissions from new or modified equipment with corresponding decreases in emissions from other equipment at the same plant so long as the total emissions from the plant remain within specified levels.[43] Permitting citizen suits where the complexity of a problem requires unencumbered experimentation tends to discourage agencies from taking new approaches such as the bubble concept, which although unconventional may best achieve the long term objectives of Congress. The present system far too easily permits adjudicative attacks on this experimentation, leading to the almost certain prospect that agencies will simply take the path of least resistance to avoid judicial admonition.[44]

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[37] *See, e.g.*, Village of Kaktovik v. Watt, 689 F.2d 222, 226 (D.C. Cir. 1982) (costly six month delay in leasing of land to develop energy resources was not justified by the apparent insignificance of alleged public benefits from citizen suit challenge); Colorado Public Interest Research Group, Inc. v. Train, 373 F. Supp. 991, 995 (D. Col. 1974) (exacerbation of energy crisis due to economic impact and delays caused by energy plant shutdown not justified by potential benefits of citizen-suit challenge).

[38] *See supra* note 6.

[39] 42 U.S.C. § 7409(c) (1982). The implementation of this standard could have been challenged under section 307(f) of the Clean Air Act, one of the seventeen statutes that are the focus of this article.

[40] A wealth of literature exists criticizing the inability of courts to understand and competently analyze complex technical matters on a regular basis. *See, e.g.*, Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) (comments of Judge Bazelon on the danger of having scientific data reviewed by "technically illiterate judges").

[41] Anderson v. Dunn, 19 U.S. (6 Wheat.) 209, 226 (1821).

[42] *See, e.g.*, Village of Kaktovik v. Watt, 689 F.2d 222, 225 (D.C. Cir. 1982) (one purpose of the statute was to expedite development of energy resources). *See also* Watt v. Energy Action Educ. Found., 454 U.S. 151, 154 (1981) (Secretary of Interior given discretion to try experimental bidding systems for offshore oil leases).

Conflict between agency enabling legislation and suit provisions creates an uncertainty regarding the proper role of citizen suits. There is no guarantee that the interests of an individual in bringing a citizen suit will be any more consonant with the policy underlying agency enabling legislation than those of many large corporations which are most often the object of antipollution and conservation regulation. It may be cogently argued that citizen suits were only intended for extreme circumstances. These rare and extraordinary circumstances would generally be limited to cases in which an administrative agency significantly and inexplicably deviated from its congressional mandate. Otherwise, citizen suits could be constantly used to impede the daily operations of administrative agencies, causing additional costs borne by the public. Surely this could not have been the intention of Congress when it enacted the citizen-suit provisions. *Village of Kaktovik v. Watt*[45] provides an example of litigation which added little substance to the interpretation or implementation of the underlying statute and was extremely costly with respect to general litigation expenses, lost licensing fees, and delay to the government.[46] Even though the court in *Kaktovik* found that the litigation created an "adverse impact on our national security and economy,"[47] the court declared that the citizen-suit provisions required the award of attorney fees to the plaintiffs if they prevailed on any issue.[48] An interpretation of citizen-suit provisions which limits litigation to cases of outrageous abuses of administrative authority would strike a more desirable balance between effective administrative decisionmaking and purposeful citizen participation.

While it is conceded that the administrative system contemplates a certain amount of judicial oversight of agency actions, the substantial increase in judicial oversight created by the existing citizen-suit statutes and their corresponding fee shifting provisions weakens the entire administrative process. As agencies concern themselves with looking over their shoulders to see how judges will act, agency authority will be unavoidably diminished because their decisions will have no sense of finality. In turn, judges will be forced to assert authority in fields in which they have little or no expertise, education, and experience.[49] Judges must not only ensure that the requisite procedures have been followed—a traditional judicial role—but also interpret the applicable substantive law and thereby displace the primary function of the agencies. Accordingly, the administrative responsibility shifts to these inexperienced judges who must decipher what Congress meant in a political and technical sense by a given statutory scheme in the context of a specific set of adjudicative facts.

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[43] *See* 41 Fed. Reg. 16,280 (1981).

[44] *See Panel IV—Judicial Review of Agency Action,* 26 AD. L. REV. 545, 553 (1974), remarks of Kenneth Cox, Institute of Federal Agencies and the Public Interest, ABA Section of Administrative Law (proposition that agencies become more cautious contributing to a variety of problems including increased delay).

[45] 689 F.2d 222 (D.C. Cir. 1982).

[46] The government determined, for example, that the cost of delay in *Kaktovik* was at least $15 million in lost interest on lease payments delayed. *Id.* at 226. For analogous examples in the area of private-party litigation, see J. LIEBERMAN, THE LITIGIOUS SOCIETY 96 (1981); Porter, *The Need for Finality On the Administrative Process: Problems in Licensing Nuclear Power Facilities,* 17 WAKE FOREST L. REV. 25, 110 (1981).

[47] 689 F.2d at 226 (D.C. Cir. 1982).

[48] *Id.*

Increased judicial oversight has been fueled by the fee shifting provisions of citizen-suit legislation. Parties are encouraged, indeed actually "paid," to come into court and upset the administrative machinery because the possibility of a penalty (in fees assessed) is effectively nonexistent, whereas the probability that the government will involuntarily finance the lawsuit is extremely high so long as the litigation is perceived as a "public benefit" of implementation or interpretation.[50] Unknowledgeable judges will have unlimited opportunities to impede the implementation of salutary administrative policies and procedures, resulting in unnecessary delay,[51] enormous costs,[52] and administrative agency atrophy.[53]

C. Economic Inefficiency Under Citizen Suit Attorney Fee Shifting

The application of basic economic theory to citizen-suit attorney fee shifting reveals that such a statutory departure from the American rule for the payment of attorney fees inevitably results in an inefficient allocation of societal resources. In seeking to remedy the problems of agency error and bias, Congress has created a "solution" in the form of citizen suit fee shifting that is more harmful than the problems it attempts to eliminate. Citizen-suit fee shifting represents no more than another instance of congressional overcorrection. Upon close inspection, it appears that a legislative gash was made by Congress where only a delicately executed surgeon's incision was needed.

An economic analysis of citizen-suit fee shifting must begin with a review of general microeconomic principles. First, the government must require pollution producing firms to pay for the costs of their harm to the environment to achieve a socially optimum allocation of resources.[54] Although the collective cost to society of pollution is high, the cost of pollution borne by each individual is not sufficient to induce individual action against polluters. Second, it is axiomatic that in a market economy individuals act to further their own personal pecuniary interests.[55] Finally, it should not be overlooked that "the governmental administrative machine is not itself costless,"[56] and that despite good intentions "direct governmental regulation will not necessarily give better results than leaving the problem to be solved by the market or the firm."[57]

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[49] *See, e.g.,* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980) (benzene exposure standards); United Steelworkers v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980) (OSHA lead exposure standards); Alabama Power Co. v. Costle, 606 F.2d 1068 (D.C. Cir. 1979) (Clean Air Act standards); BASF Wyandotte v. Costle, 598 F.2d 637 (1st Cir. 1979) (Federal Water Pollution Control Act).

[50] Florida Power & Light v. Costle, 683 F.2d 941, 943 (5th Cir. 1982).

[51] *See, e.g.,* Village of Kaktovik v. Watt, 689 F.2d 222, 226 (D.C. Cir. 1982) (unsuccessful citizen-suit challenge resulted in a six-month delay in the lease sale of the Alaska Continental Shelf); *see also* Note, *The Judicial Role In Defining Procedural Requirements for Agency Rulemaking,* 87 HARV. L. REV. 784, 785 (1974).

[52] *See, e.g.,* Village of Kaktovik v. Watt, 689 F.2d 222, 226 (D.C. Cir. 1982), where the government estimated that the six-month delay caused by an unsuccessful citizen-suit challenge to its proposed lease of the Alaska Continental Shelf resulted in direct costs to the government in excess of $15,000,000 and indirect ripple effect costs to the economy as a whole approaching $60,000,000.

[53] On the consequences of judicial excess, Chief Justice Burger has warned that "[w]hen the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles, tend to atrophy." Plyler v. Doe, 457 U.S. 202, 253 (1982) (dissenting opinion); *see also* A. BICKEL, THE LEAST DANGEROUS BRANCH 21 (1962).

Litigation is not a costless activity. Thus, a party will pursue litigation in the absence of subsidy (the American rule) only when the perceived benefits exceed the predicted costs and associated risk attendant to a particular claim. Citizen-suit fee shifting effectively makes private actions against federal agencies costless except on those rare occasions when the courts refuse to award fees because the public benefit was not in any way furthered by the lawsuit. Fee shifting removes the most substantial constraint on litigation—attorney fees. The inescapable result is a costly and unrestrained growth in litigation against federal agencies. It is quite easy, no doubt, to conceive of hypothetical situations in which an absurd award of fees might be made because the public interest was marginally benefited, despite the enormous direct and consequential costs of the litigation. One need not, however, resort to legal imagination to find such instances. In *Village of Kaktovik v. Watt,*[58] for example, the concern of various environmentalists over the possible adverse impact on whales from the sale of the Alaska Continental Shelf delayed the sale for six months. The cost of this delay was estimated to exceed $75,000,000.[59] Although the court refused to award fees to the plaintiffs, such an award was sought and apparently expected.[60] The prospect of an award of attorney fees provided by the applicable citizen suit fee shifting provision was a substantial, if not an overriding, inducement to the plaintiffs in *Kaktovik* to bring suit against the government. In causation terms, "but for" the propsect of attorney fees the plaintiffs in *Kaktovik* probably would not have brought suit. Few individuals except the most ardent of whale lovers would seriously contend that the *Kaktovik* citizen suit was an appropriate, desirable, or efficient allocation of societal resources. Even fewer individuals would argue that an award of attorney fees in

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[54] One economist has explained that pollution requires government intervention to achieve market efficiency

> [b]ecause important environmental costs are not covered in the resource-use charges, [and therefore] the market economy's adjustment, in terms of both least firm cost and broader 'public interest' objectives, falls short of the ideal . . . . If there were a price penalty for polluting, the costs of abatement would be imposed upon the production process and adjustments would be made in resource use.

L. HINES, ENVIRONMENTAL ISSUES 226 (1973). *See also* E. GRAMLICH, *supra* note 21, at 19-20.

[55] A. SMITH, THE WEALTH OF NATIONS 345 (London, 1893).

[56] Coase, *The Problem of Social Cost,* in MICROECONOMICS, SELECTED READINGS 368 (E. Mansfield ed. 1971).

[57] *Id.*

[58] 689 F.2d 222 (D.C. Cir. 1982).

[59] *Id.* at 226.

[60] *Id.* at 228.

Kaktovik was justified regardless of whether the plaintiffs in that suit prevailed on any issue, especially if they failed to prevail on the predominant issue in the case.

There remains a second major economic criticism of citizen-suit fee shifting that cannot be ignored. Congress mistakenly presumed that private citizens will always or usually base the decision to bring a citizen suit on whether the public interest is thereby furthered. Such economic altruism is unlikely to be found in the typical citizen-suit plaintiff. For it is no less true now than it was over two hundred years ago that, as the great market economist Adam Smith then declared, "every individual . . . neither intends to promote the public interest, nor knows how much he is promoting it. . . . [H]e intends only his own gain."[61] Concededly, the public interest and the interest of the citizen-suit plaintiff may occasionally be coextensive, but this relationship is more likely a product of chance than necessity. The result of a national referendum regarding the decision to bring a particular citizen suit would probably, more often than not, differ from the decision made by an individual or interest group minority. But because of the likelihood of an award of fees these individuals will bring citizen suits irrespective of whether the public interest is actually and substantially furthered.[62]

Fundamentally, citizen-suit fee shifting is economically unsound. Routine fee awards lead to an excessive amount of litigation against federal agencies. And the private interests of individual citizen-suit plaintiffs have no necessary or demonstrated nexus with the public interest.

D. Judicial Policymaking

1. *The Ubiquitous Judiciary.* Citizen-suit statutes and their associated fee shifting provisions remove the principal disincentives to suits against federal agencies and thus impede the administration of government.[63] Although direct, these consequences may not, however, be the most deleterious.[64] Ultimately, citizen-suit statutes authorizing attorney fee awards that provide litigation incentives shift policymaking from the legislative and executive brances of government to the unelected and politically unaccountable judicial branch. These statutes accomplish this shift by relaxing historically self-imposed prudential limitations on the federal judiciary, by leaving crucial statutory terms undefined, and by failing to provide the courts with standards they can apply. Such a transfer of policymaking from the legislature to the judiciary "raises the justifiable concern that important

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[61] A. SMITH, *supra* note 55, at 345. Admittedly, Adam Smith meant by this remark that the each individual acting in pursuit of his own personal gain would, through the "invisible hand" of the market, further the public interest by assisting society in reaching an efficient allocation of resources. *Id.* But the market situation of which Adam Smith so eloquently spoke has been destroyed by citizen-suit fee shifting legislation. The market for litigation exists only where the American rule prevails. Fee shifting destroys this natural market by removing the cost-of-litigation restraint for one party.

[62] In determining whether to award fees to a citizen-suit plaintiff the courts have articulated the requirement that the suit further the public interest in some way. Carpenter v. Andrus, 499 F. Supp. 976, 979 (D. Del. 1980). As a practical matter, however, the public interest threshold requirement for an award of fees is easily satisfied. Seldom will a nonfrivolous citizen suit against a federal agency fail to at least slightly further the public interest. An award of fees is thus the rule rather than the exception. Whether the public interest is *actually* and *substantially* furthered by a citizen suit is, however, a far different question.

[63] *See supra* note 11 and accompanying text.

[64] Note, *supra* note 51, at 805.

policy decisions will be made by a bevy of Platonic Guardians,"[65] rather than by elected representatives. And once the precedent for countermajoritarian judicial policymaking is firmly established, its breadth cannot be easily limited.

2. *Justiciability Limitations on the Federal Courts.* Inherent in citizen suit statutes are many of the same evils that the federal courts attempt to prevent through self-executed justiciability limitations. Historically, the courts have adhered to the constitutional mandate that they decide only "cases or controversies"[66] by requiring that the issues presented in a suit be "justiciable." The concept of justiciability embodies two relevant elements.[67] First, standing to sue requires that the complaining party must have sustained, or be in immediate danger of sustaining, a direct injury as a result of the acts or omissions of the defendant.[68] Second, the separation of powers and prudential concerns preclude the courts from adjudicating cases that are judicially defined as "political questions."[69]

Citizen-suit statutes extend justiciability to its farthest limits by relaxing, if not completely removing, the requirement of standing. These statutes greatly expand the number of potential plaintiffs who may initiate an action from those having suffered personal harm—the traditional standard—to any citizen, regardless of whether he has incurred a direct personal injury. Consequently, the courts are presented with general theoretical allegations, rather than the specific, concrete, triable issues that an injured plaintiff normally provides in the pleadings.

The authorization of citizen suits against government agencies also expands traditional notions of justiciability by encouraging the courts to decide cases which, although not labelled as such, fit squarely within the Supreme Court's definition of political questions.[70] Both the substantive determination in a citizen suit and the fee award decision involve "a lack of judicially discoverable and manageable standards" and "the impossibility of a court's undertaking independent resolution [of such issues] without expressing lack of the respect due coordinate branches of government."[71] Citizen-suit legislation requires the courts to entertain challenges to administrative processes and determinations which they routinely refuse to decide under the Supreme Court's established political question criteria for determining when to subject a statute or regulation to minimal judicial scrutiny in deference to the executive and legislative branches. For example, in *Sierra*

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[65] L. HAND, THE BILL OF RIGHTS 73-74 (1958).

[66] U.S. CONST. art. III, § 2.

[67] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974).

[68] Valley Forge Christian Academy v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); *Ex parte* Levitt, 302 U.S. 633, 634 (1937).

[69] A political question is one which involves

> A textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962); Powell v. McCormack, 395 U.S. 486, 518-19 (1969).

[70] *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

[71] *Id.*

Club v. Costle,[72] one of the original decisions giving rise to *Ruckelshaus v. Sierra Club,*[73] the court in a voluminous opinion concluded, after reevaluating each step performed by the EPA in promulgating new emissions standards for coal burning power plants, that the EPA had properly construed its congressional mandate. Although the court remarked that it had "on close questions given the agency the benefit of the doubt out of deference for the terrible complexity of the job,"[74] the decision clearly revealed that the court had in fact extended no such deference. The many important and difficult-to-balance policy concerns addressed in the EPA's new standards were subjected to judicial scrutiny, thereby seriously sacrificing the values underlying the fundamental premise of our system of government—that policy choices should be made by politically accountable representatives.[75] Because these challenges often involve policy choices, the courts necessarily decide issues which are resolved more appropriately by a politically sensitive branch of government.[76]

Citizen-suit statutes enlarge the justiciability boundaries of federal courts by disregarding these limitations on judicial power. But in so doing, the statutes also disregard the important purposes behind standing and the political question doctrine. The underlying element of these justiciability concerns is the recognition that by restricting the judicial power to actual disputes in which the parties have real and personal stakes, justiciability not only conserves judicial resources but also prevents the courts from providing "remedies" for every social or economic grievance.[77] To the extent that citizen-suit statutes and attorney fee shifting legislation encourage adjudication of these controversies, they plainly encourage judicial policymaking.

3. *The Courts' Ability to Adjudicate Citizen Complaints.* The courts are ill-equipped to decide the types of issues which routinely arise when citizens challenge administrative agency determinations and procedures. To begin with, the extremely overloaded dockets of most federal courts[78] prevent judges from spending the time necessary to understand an agency determination that probably required months or even years to make. Problems caused by time and other resource constraints are compounded by the lack of judicial expertise in the technical matters involved.[79]

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[72] 657 F.2d 298 (D.C. Cir. 1981).

[73] 103 S. Ct. 3274 (1983).

[74] *Id.* at 410.

[75] It is fundamental that the courts may not "substitute their own pleasure to the . . . intentions of the legislature." THE FEDERALIST NO. 78, at 507 (A. Hamilton) (Mod. Lib. ed. 1937).

[76] The Supreme Court has recognized that "judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." Vance v. Bradley, 440 U.S. 93, 96-97 (1978). *See also* Berger, *Commentary—"The Supreme Court As A Legislature": A Dissent,* 64 CORNELL L. REV. 988, 993 (1979).

[77] The Supreme Court has repeatedly held that "the Constitution does not provide judicial remedies for every social and economic ill." Lindsey v. Normet, 405 U.S. 56, 74 (1972); *see also* Plyler v. Doe, 457 U.S. 202, 253 (1982) (Berger, C.J., dissenting); Reynolds v. Sims, 377 U.S. 533, 624-25 (1964) (Harlan, J., dissenting).

[78] *See supra* note 35 and accompanying text.

[79] It seems obvious that "the legislature is . . . a better fact-finding body than an appellate court" insofar as "the typical legislature will command wider knowledge and keener appreciation of current social and economic conditions than will the typical court." Cox, *The Role of Congress In Constitutional Determina-*

Admittedly, federal judges are expected to be generalists capable of educating themselves in concepts and theories foreign to them; nonetheless, the number and complexity of considerations relevant to administrative fact finding and decision-making in the fields in which citizen suits are available render these problems and their administrative solutions uniquely inappropriate for judicial reevaluation.[80]

Exacerbating the difficulties inherent in judicial review of an agency determination is the distinctive characteristic of citizen suits—plaintiffs need not assert any personal injury resulting from the challenged determination. Thus, the court must focus not on any discrete and comprehensible relationship between the plaintiff and the defendant, but rather on the long range and far reaching implications of an often unimplemented governmental choice. In short, not only does the court review an agency determination that has often taken years to make, and not only must the court assimilate information that is highly specialized and complex, but it must also do so in a context practically devoid of the particularity and concreteness that a plaintiff who suffers actual loss brings to court. Even one with abundant faith in the federal judiciary should be reluctant to tax its abilities and resources so severely. The burden on the courts is increased by the award of attorney fees which fosters litigation by providing previously unavailable financial incentives for private litigants to challenge administrative actions.

4. *Political Accountability.* A less obvious reason that the courts are ill-suited as ultimate arbiters of administrative determinations is the lack of political accountability in life-tenured federal judges. The Constitution incorporates norms of self-government which entrust the development, evaluation, and implementation of national public policy to the elected branches of government.[81] One major benefit of this entrustment is the responsiveness of public policy to electoral influence. Popular elections enable the electorate to insist on desired changes in policy by voting for candidates sympathetic to their views, thereby making officials attentive to voter sentiments between elections. The power to influence public policy increases citizen participation in the electoral process, encourages citizens to educate themselves about policy issues, and enhances the legitimacy of government in the eyes of the people. To the extent public policy is forged in litigation by unelected federal judges with lifetime tenure, these foremost democratic values are thwarted.[82] Neither history nor policy provides an adequate justification for the impairment of these democratic principles upon which our government is premised.

Rather than the mere administration of a legislative mandate, federal agency rules and procedures, regularly challenged in citizen suits subsidized by attorney fee awards, are precisely those policy issues for which our constitutional system assigns responsibility to the politically accountable branches of government. Challenges to administrative determinations demand solutions far beyond the scope of

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tions, U. CIN. L. REV. 199, 209 (1971). This observation is even truer with respect to federal administrative agencies and their presumed regulatory and scientific expertise.

[80] *See, e.g.*, Powell v. Pennsylvania, 127 U.S. 678, 685 (1888).

[81] U.S. CONST. arts. I & II.

[82] *See* L. HAND, *supra* note 65; J. THAYER, JOHN MARSHALL 106-07 (1901).

the judicial function which has historically been limited to the application of statutory and common law to particular factual situations.

Administrative agencies must frequently balance competing policy objectives. In promulgating rules, regulations, and standards, agencies do not simply implement existing public policy, but rather develop solutions which account for these disparate objectives, based on the agencies' experience and expertise. Illustrative of the many multifaceted issues which require administrative solutions are what levels of sulphur dioxide emissions we are willing to tolerate in the air[83] and how much of the Alaska continental shelf should be leased or sold to private companies in order to exploit domestic oil and gas resources.[84] At the risk of redundancy, it is apparent that citizen-suit and attorney fee provisions shift responsibility for these important policy choices from the administrative agencies, which were legislatively created to make such choices, to the courts, which were not.[85] These provisions thus promote, indeed compel, judicial policymaking.

5. *Judicial Discretion.* Even if the public is willing to accept the negative results of citizen suits in order to allow litigants to enforce particular statutory schemes, it does not follow that the enormous amount of judicial discretion created by the standardless, open-ended statutes now in force must also be accepted.[86] Because the courts have been given few statutory guidelines with respect to the circumstances under which parties should be awarded costs, judges encourage or discourage particular types of litigation based on their personal policy predilections. In failing to formulate standards the courts can apply, Congress has forced the courts to "play legislature in [their] 'interpretations' of the statute."[87]

The cost shifting provisions of citizen-suit legislation[88] are typified by section 307(f) of the Clean Air Act.[89] Congress amended an earlier version of the Clean Air Act to permit courts to award fees and other costs when "appropriate." This amendment instructed the courts to relax the standard for awards of costs from that which was then being applied. The House Committee on Interstate and Foreign Commerce stated: "The Committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the 'prevailing party.' In fact such an amendment was expressly rejected by the Committee. . . ."[90] But, even though Congress was explicit that "appropriate" was not to be the equivalent of "prevailing," Congress completely failed to define the term "appropriate."[91] Indeed, the term "appropriate," absent further definition and some point of reference, necessitates a policy choice rather than a judicial evaluation. As Professor Charles Black noted, the issue is

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[83] EPA standards limiting the amount of sulfur dioxide emissions by coal burning power plants were challenged in Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981), the original case that gave rise to the attorney fees issue in *Ruckelshaus v. Sierra Club,* 103 S. Ct. 3274 (1983).

[84] The Secretary of the Interior's decision to sell outer continental shelf land was at issue in North Slope Borough v. Anders, 642 F.2d 589 (D.C. Cir. 1980).

[85] The core of judicial discretion is choice:

> To say that a court has discretion in a given area of law is to say that it is not bound to decide the question one way or the other. In this sense, the term suggests that there is no wrong answer to the questions posed—at least there is *officially* no wrong answer.

Rosenburg, *Judicial Discretion of the Trial Court—Viewed from Above,* 22 SYRACUSE L. REV. 635, 636-37 (1971) (emphasis in original).

[86] "That system of law is best which confides as little as possible to the discretion of the judge . . . ." B. SHIENTAG, THE PERSONALITY OF THE JUDGE 94 (1944) (quoting an old Latin proverb).

[87] Alabama Power Co. v. Gorsuch, 672 F.2d 1, 8 (D.C. Cir. 1981) (Wilkey, J., dissenting).

[88] *See supra* notes 5-6 and accompanying text.

[89] 42 U.S.C. § 7607(f) (Supp. V 1981).

> whether the materials available as foundations for judicial judgment contain . . . concepts and terms so vague and ambiguous, so intractable to the normal intellectual processes of law, that a congressional command to interpret them must be *disobeyed* on the Article III ground that the judiciary has been commanded to perform a non-judicial function . . . ."[92]

The term "appropriate," as used in the cost shifting provisions of the Clean Air Act and similar legislation, is precisely the kind of "vague and ambiguous" concept Professor Black had in mind. The failure of Congress to establish standards to guide the courts forces them to formulate their own standards. The courts not only decide who must bear the costs of litigation, but in making decisions as to costs, also promote particular kinds of challenges to administrative determinations. In creating their own standards and thus influencing the kinds of challenges that come before them, courts engage in public policymaking, which in Professor Black's terminology is unmistakably a "non-judicial function." And the courts have not remedied the vague command of those fee shifting provisions by interpreting the statutes in a manner which fetters judicial discretion. The Supreme Court in *Ruckelshaus v. Sierra Club*[93] minimally restricted judicial discretion to award fees and other expenses in citizen suits by requiring only that plaintiffs succeed on at least one claim (among the many they have asserted) before they may receive a fee award.[94] The Court leaves open the prospect that a plaintiff could receive his litigation expenses on the basis of his "success" on a minor part of his case. Even after *Ruckelshaus,* governmental policy might be vindicated, and the basic agency determination validated, but based on a relatively insignificant procedural deficiency, the government may nevertheless be required to pay the costs of a challenge to its judicially sanctioned action.

The inimical combination of vague language and the absence of either clear legislative guidelines or intent produces a situation in which federal judges have an almost unlimited discretion to award fees according to their own policy proclivities. This discretion thrusts the courts into the forefront of policymaking in fields where fee shifting is available. In this context, Chief Justice Marshall's well-known declaration that it is "the province and duty of the judicial department to say what the law is"[95] takes on an entirely new meaning.

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[90] House Report, *supra* note 13, at 1416.

[91] Although the House Committee on Interstate and Foreign Commerce cites National Resource Defense Council, Inc. v. EPA, 484 F.2d 1331, 1338 (1st Cir. 1973), for an interpretation of "appropriate" similar to that intended by the Committee House Report, *supra* note 13, at 1416, it seems that the citation is intended to support the Committee's rejection of "prevailing" as the sole criterion for fee awards. The Report does not expressly adopt the standards applied in *National Resource Defense Council,* nor are these standards particularly helpful.

[92] C. BLACK, DECISION ACCORDING TO LAW 42-43 (1981).

[93] 103 S. Ct. 3274 (1983).

[94] *Id.* at 3281.

[95] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

IV

ALTERNATIVES

What are the alternatives to existing citizen-suit statutes and their cost shifting provisions? The first apparent alternative is to return to historical notions of justiciability. This approach would necessitate eliminating citizen suits per se, although a general cause of action would remain for individuals suffering cognizable injury. A return to traditional ideas would relieve the courts from resolving direct personal disputes in which the complaining party has suffered no personal loss or in which the "rights" or "duties" asserted are political rather than legal in nature. Following this course would also entail a return to the American rule which presumes that a sufficient incentive for litigation exists when there is an expectation of success on the merits, while the probability of loss on the merits deters frivolous or weak claims. Adherence to the rule would force potential litigants to assess the value of their particular claims in contradistinction to the present citizen-suit system which requires no individual stake in the outcome and therefore no such assessment. Retaining these traditional concepts would greatly reduce the delay and added expense caused by the unnecessary interference of private litigants and federal judges in the administrative process. More important, the traditional rules would reduce the opportunity for "lawmaking" according to the politically unchecked policy views of a single judge.

Assuming Congress is unwilling to abandon citizen suits, it should revise and improve the present fee shifting provisions by making three primary changes. First, the provisions ought to require clearly that fee shifting be *in fact* two-way to discourage trivial claims. More precisely, when the government prevails against a private litigant, the government should receive its actual, reasonable litigation expenses including attorney fees incurred in defending the suit. Conversely, when the private litigant prevails he should receive his reasonable litigation expenses. The terms "prevail" or "success" should be explicitly defined to guide the courts in cases where both parties have prevailed to some degree. To accomplish the disincentive purpose of fee shifting, a party should not be able to recover its costs unless it has prevailed on the predominant part of its case; the "prevailing" party should be the litigant who has won more of the case than it has lost. Second, the various provisions authorizing the award of costs in citizen suits should be phrased consistently so that improper distinctions are not drawn from slightly different word usage. Third, Congress should expressly identify the standards that courts are to apply in awarding costs. In determining these standards, Congress should look at the experiences courts have had with various approaches and decide whether these approaches encourage the right kinds and prevent the wrong kinds of litigation. It should be remembered, however, that these revisions, although representing an improvement of the present citizen suit fee shifting scheme, are not preferred over the complete elimination of such statutorily permitted attorney fee awards. The following model statute illustrates the above recommended changes:

> In any judicial proceeding under this section, [i.e., the substantive law containing the citizen-suit provision] the court may award costs of litigation (including reasonable attorney

> and expert witness fees) to any party including the federal government upon a finding that the following circumstances are present:
>
> A. The party has *substantially* prevailed, and
>
> B. The party has sought to effectuate the purposes of this section by:
>
> 1. Supplying new and important information;
> 2. Raising a significant interest that was not considered in a legislative or administrative forum;
> 3. Demonstrating the failure of governmental departments, agencies, or officials to fulfill nondiscretionary responsibilities delegated to them under this section; or
> 4. Demonstrating that challenged administrative procedures or determinations were performed in violation of this section.

After Congress revises the cost shifting provisions, it should evaluate the application of the new provisions as soon as there is sufficient information to make a meaningful appraisal. Congress should determine whether the economic and other policy objectives of fee shifting are being satisfactorily achieved. More specifically, does the legislation encourage citizen enforcement of the statutory scheme? Has two-way fee shifting deterred frivolous suits? To what extent have citizen suits impeded the admininstrative process? The point here is that the precise consequences of citizen-suit statutes are unknown, which necessitates an early evaluation of the actual effects of suits authorized by the statutes.

V

CONCLUSION

In recent years it seems that political decisionmaking has become a task ingeniously avoided with disturbing frequency by Congress. As a result of this trend, Congress has increasingly abdicated a substantial part of its responsibility to the other branches of government. The shift to the judicial branch means that decisions once made through the political process are now adjudicated. What adjudicative, as opposed to political, decisionmaking means, however, is that decisions are made with a view to the interests of the few parties before the court rather than society as a whole. Adjudicative decisionmaking also means that the decisionmakers are not directly accountable to any constituency. When Congress relinquishes responsibility for fundamental policy choices to the courts, government not only becomes far less susceptible to popular influence, but also far more vulnerable to the personal views of life-tenured federal judges. Awards of attorney fees greatly increase policy-oriented litigation, thus affording unaccountable judges greater opportunity to make decisions more appropriately made by elected branches of government. Equally important, citizen suit fee shifting cannot be justified under the basic economic principles of efficient resource allocation.

Genuine representative government cannot flourish when conventional wisdom grudgingly insists that no government action is either lawful or legitimate until approved by a federal judge. As President Lincoln eloquently warned:

> [T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation between parties in personal actions, the people

> will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.[96]

From the foregoing analysis, it is plain that the foundation of justification on which citizen-suit fee shifting rests is unpersuasive and unsound. It is one thing for Congress to allow, as it should and must, those substantially and adversely affected by government decisions to challenge them in court. It is quite another thing for Congress deliberately to induce and reward litigious meddlesomeness by those who simply do not like the results of our political and administrative processes (and who could instead try to change the results through these same processes). As the legislative history of citizen-suit fee shifting provisions strikingly reveals, the above economic and structural criticisms of these misguided statutes have not previously been considered by Congress.

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[96] THE INAUGURAL ADDRESSES OF THE AMERICAN PRESIDENTS 238 (D. Lott ed. 1961).

Senator **Hatch**. Let me turn to the distinguished chairman of the full committee, Senator Thurmond, at this point.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

The **Chairman**. Thank you very much, Mr. Chairman.

Mr. Jensen, we are very pleased to have you with us. I have to read your testimony. I had another hearing this morning, and I have to meet with the Japanese Foreign Minister and his delegation in about 10 minutes.

It is a pleasure to be here, Mr. Chairman, as the Subcommittee on the Constitution begins its consideration of S. 1580, the proposed Legal Fees Equity Act. Since 1974, the Congress, in some 130 statutes, has provided exceptions to the traditional American rule—a rule under which each party to litigation bears its own legal expenses. Under these statutes attorneys' fees may be awarded to parties in litigation before the courts or administrative agencies.

The purpose of the fee-shifting statutes is to enable indigent parties, victims of discrimination, and others to attract competent legal talent to litigate their claims. Because many of these statutes allow the recovery of attorney fees from State, Federal, or local government, the liability of governments in opposing private parties has been largely expanded.

The purpose of S. 1580 is to bring some greatly needed rationality and consistency to government compensation of private attorneys.

In hearings before this subcommittee last year, the Department of Justice pointed out several types of problems which exist in the administration of the fee-shifting statutes. Those problems include the increasing incidence of inordinately high attorney fees, the great disparity of attorney fee awards, and the burdens to courts and litigants which result from expensive litigation or attorney fee issues.

Now, Mr. Chairman, these problems can be solved if Congress is willing to enact coordinated and comprehensive rules for compensating attorneys under the many fee-shifting statutes. The Legal Fees Equity Act attempts to accomplish that goal, and I believe it deserves our serious consideration.

I want to commend the Justice Department for recommending this legislation, and I feel it is important. I feel they must do something along this line because there have been abuses. In some cases attorneys charging $200 and $300 an hour. I believe in this bill the maximum fee would be set at $75, would it not, Mr. Jensen?

Mr. **Jensen**. Yes, Senator.

The **Chairman**. We think that would be a reasonable fee for cases of this kind.

Thank you very much for your appearance, and I want to thank you, Mr. Chairman, for your fine interest and intelligent effort in this regard, too.

Senator **Hatch**. Thank you, Mr. Chairman.

We will turn to Senator Grassley at this point.

Senator **Grassley**. Thank you, Mr. Chairman.

Mr. Jensen, I would like to get into some detail in the legislation before I ask you about some of the terms used. I would like to have you give us a rough idea of how S. 1580 promotes consistency in the calculation of attorneys' fees.

Mr. **Jensen**. Well, as pointed out in the testimony, and then submitted in addition to that, a table of fees that have actually been awarded over the past, and I believe a study and a summary by the U.S. Attorney's Office shows an incredibly wide spread of attorneys' fees being awarded, and different hourly rates, with multipliers and bonuses that are just without any criteria that have been articulated by Congress, or that have been articulated by the courts.

What you have is truly a disparate system of awarding fees to plaintiffs. What this bill does is to come up with guidelines, and the determinate structure for the courts to follow. As it is now, there is simply unlimited discretion, so that the structure in the bill, by various reckonings—the definition of the standard for being a prevailing party the limitation of $75 per hour, and various other structures—brings a specific kind of construct to the fee award by Federal courts in litigation that involves State or local entities.

Senator **Grassley**. The bill allows a fee recovery, only if the work for which the fee was sought was on issues upon which the party prevailed, and was not excessive, redundant or otherwise unnecessary.

Now, aren't these terms in S. 1580 subject to litigation?

Mr. **Jensen**. I do not think there is any question that they may be subject to litigation. What they are is a resolution of factual situations case by case. If there is an excessive award, it is one that is going to have to be determined within a specific case. You can give examples. I think the chairman gave some examples. There are awards of hundreds of thousands of dollars when recovery had been minimal. There was a case in the ninth circuit involving a suit against prisons where there was an award against two individuals of $2,000, and the fee awarded was $45,000 or larger and something like $10,000 to an inmate advisor. Those kinds of awards are excessive, and that conclusion is based on the factual circumstances. They will require case-by-case litigation in that sense.

Senator **Grassley**. Then I think it is necessary for me to ask how well the proposed standards limit the amount of litigation over what the fee should be, then?

Mr. **Jensen**. The standard works in a couple of ways. There are some areas—concepts such as protracted litigation, excessive awards, redundant litigation—that are going to have to depend upon looking at the case, but in addition to that, as you pointed out, Senator, there are some absolute standards that provide specific lines. In addition to those case-by-case standards, there are generic limits built into the statute such as the hourly rate.

Senator **Grassley**. It is the hourly rate then and not any change in the standards, that limits the litigation.

Mr. **Jensen**. I think the hourly rate probably is the most important. I think those other concepts are important. For example, under the present circumstance, when we talked about the notion that the underlying concept is to award competent counsel when they prevail. We have been in situations where the judgment is such that the party loses, and then the concept is because another issue was also litigated, that is deemed to be a part of the award structure, we give awards even though the party loses. That does not make much sense, and we would prohibit that.

Senator **Grassley**. Does the hourly fee limitation, as opposed to other purposes of the bill, accomplish the results that you desire?

Mr. **Jensen**. Probably, it will be the most important factor.

Senator **Hatch**. Well, thank you. I want to thank you, Mr. Jensen, for coming. We appreciate your testimony, and we will certainly allow you to keep the record open so you can supplement it any way you wish.

Mr. **Jensen**. If I could, Mr. Chairman, Senator Simon pointed out there are a couple of areas that he has interest in. I would be happy to submit written responses to that.

Senator **Hatch**. We would appreciate that, and we will keep the record open for any other Senator who would like to submit written submissions on this issue.

Thank you for coming.

Our next two witnesses represent the National Association of Attorneys General. The subcommittee is pleased to welcome Mr. Francis X. Bellotti, attorney general of Massachusetts, and Attorney General Jim Jones of the State of Idaho.

Mr. Bellotti has served as Lieutenant Governor of his State. General Jones was elected to his position in 1982 and has served admirably in that position, and I would just wish to note that we consulted with Senator Symms before inviting you.

General Jones, you are a neighbor, and I am happy to have you because of that. Senator Symms said you would be highly committed to the work that you had done in your State. I have got a terrible problem, because I have to be on a network TV debate here within just a short period. I wonder if I could put your statements in the record, limit you to about 5 minutes, and then have just a few minutes for questions.

We would also keep the record open for all other Senators to ask questions.

Mr. Bellotti, we will begin with you. We are very grateful to you for attending.

STATEMENT OF PANEL CONSISTING OF FRANCIS X. BELLOTTI, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, BOSTON, MA; AND HON. JIM JONES, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, BOISE, ID

Mr. **Bellotti**. I am happy to be here, Mr. Chairman. I would consider my testimony submitted as part of the record.

Senator **Hatch**. Without objection.

Mr. **Bellotti**. As briefly as I can, I will touch on some of these points. I agree with what Deputy Attorney General Jensen has already said. I would add that I have seen the issue from both sides, having been a Lieutenant Governor two decades ago and attorney general for the past 11 years, and having been a private practitioner for 20 years and having tried over 1,000 cases at all levels of our courts. As a result of that experience, I have a balanced view on attorney's fees.

Absolutely, legislative reform is needed. There has never been an issue in the National Association of Attorneys General that has had such bipartisan support. Our position has been embraced by liberals, moderates, and conservatives.

I feel very strongly about this. We are in a unique position, because we litigate these cases and we see the explosion of this fee litigation. The litigation really detracts from the original congressional intent behind the Fees Act which was to aid indigent people who might not be able to afford counsel, in protecting real civil rights. Our cases now go so far beyond that original goal that protecting real civil rights is only a very small part of the law's application. Fee litigation now involves everything in the U.S. civil code; it has gone way beyond civil rights cases. Moreover, the "reasonableness attorney fees is probably the most useless of all standards, for attorneys's fees, because it allows and has allowed outrageous awards. I am not going to get into the details. You see them. We have submitted our report.

I do not want to be repetitious, but I find it really outrageous when attorneys can claim $2,600 for scheduling a hearing in a case, or over $600 for just citing a case in a one-sentence letter under a "reasonableness" standard. Things of that nature are the opposite of reasonable.

Attorneys' fees also have a tremendous impact on State and local budgets, and, really, what has not been touched on in prior testimony is the tremendous impact the fear of fee awards now has on the decisionmaking process. When I see a case come in, I decide now not only on the basis of whether the subject matter should be litigate attorneys' fees? I ask whether I am burdening my State with tional factor in trying to protect the financial interests of the citizens of my State. I ask whether I am now going to be hit and spend a great deal of time in district court and circuit court of appeals to litigat attorneys' fees? I ask whether I am burdening my State with potentially outrageous awards. These questions and their answers have an effect on whether you defend these cases or not, especially when they are close cases with no clear precedent.

In many cases we are hit with attorney fees for doing what the Federal Government mandates us to do. In Massachusetts we were told to operate our AFDC Program in a specific way or we would not get our Federal grant. When we were sued for following the Federal regulations we had to pay the attorney fees for doing what we were told to do, to get the grant in our State. And, of course, instead of having a "substantially justified" defense and a $75 cap, as the Federal Government does, our fee liability was computed on the so-called reasonable fee standard. That does not make logical sense to me. We need specific legal standards to get away from this socially useless litigation.

Senator HATCH. If you think that is bad, I suggest you look over this Grove City legislation that Senator Kennedy from your State is pushing. If you think the Federal Government can come in and tell the State and local governments, what to do under these provisions, you ought to look at that bill. It is going to inject the Federal Government into local and private affairs on a trickle-down theory like you have never seen it in your life. Many advocates for civil rights just blindly ignore those consequences in their zeal for civil rights. I feel very deeply about civil rights, too, but there are certain things about federalism that are important.

Let me send that bill to you. Please take a look at it, because I have a lot of respect for your legal ability, and I would value your impression of that legislation.

Mr. **Bellotti**. Well, Mr. Chairman, that is the real problem with this bill that nobody has mentioned in this hearing. A great many liberal Senators and Congressmen who feel that if they address this problem they will be considered or perceived as having withdrawn from civil rights. I see no relation between giving great rewards to lawyers and protecting civil rights. There is no relationship between those two things.

The Congress sets specific standards for payments under Federal programs. For example, under the Medicare and Medicaid Programs a doctor cannot submit bills for services based on what he or she thinks is "reasonable." The Criminal Justice Act has a $60 cap on fees and the EAJA sets a $75 cap, but it is open season on the States.

We have to protect our citizens' tax dollars and we have to protect their civil rights. I know those things are not mutually exclusive. But there has to be legislative reform. There may be things that I might not totally agree with in this bill, but it makes long strides in the right direction. For example bonus multipliers are just tips. I see no logical rationale for bonuses and multipliers. Another major problem facing us is ethical in nature. Ethical charges have been filed against attorneys general around the country when, in an effort to represent our clients, we offer to settle attorney' fees claims simultaneously with the merits. Some public attorneys have been told that it was unethical for us to do so. In terms of magnitude of exposure, in Massachusetts we have a case pending now for $2.5 million in fees.

The original intent of section 1988, and intent of this bill, is to attract adequate and competent counsel to prosecute Federal civil rights cases. Plaintiffs are not entitled to and do not need the greatest expert in the world. The States do not have them. The lawyers in my office do not make anything resembling the kind of money that many plaintiffs' lawyers even begin to look for, before the bonuses and multipliers are tacked on. Yet, I have very competent counsel in my office that I would put up against anyone in the world.

Let me address the proposed cap. That issue needs to be analyzed in two steps. You determine first if you need a standard. I say, yes, you do. The courts cannot do it; they themselves say that they cannot do it, that we should be looking to the Congress for correction.

Assuming a standard is necessary, or desirable, the next question is whether $75 per hour is reasonable. I say it is. The Federal Government pays that under the Equal Access to Justice Act. As a legal newspaper in Massachusetts editorialized: No one is going to get rich on it, but it certainly is sufficient to attract competent counsel.

Another important consideration, Senator Hatch, is the public perception. I do not believe that anyone in the public, at least my citizens and my State, would think that $75 per hour was an outrageously low kind of fee. Payments at that level simply do not constitute an abandonment of commitment to civil rights enforcement. If I thought it did, I would not back this measure. I return to the health care analogy. Under the reimbursement of the Medicaid Program, an eligible patient can hire the greatest surgeon in the world, but he still gets the same price as everybody else does, not what he bills his private patients. I say you can fulfill the original intent of Congress and attract competent, adequate counsel for $75 an hour. There is no problem doing that. If you have a problem in certain markets like Los Angeles and New York, maybe it can be a little higher, but nothing that resembles what we have to pay now.

The lack of any standard is precisely the root of the problem here, and all we are saying is that we can introduce reasonable standards in setting lawyers fees without withdrawing from our commitment to civil rights.

We are asking that we set discernible standards, so if we sit down and settle a case, or we look ahead in the case to litigate an issue, that there is some predictability, some consistency. You do not know now whether you have to pay $50,000 or $1 million in the case. You can pay a judgment of $1 to the plaintiff, but $150,000 in fees to the lawyer.

In one case out of my State, plaintiffs' attorney looked for $412 per hour, to litigate a liquor license case.

Senator HATCH. That is in spite of the fact that the chief counsel in that case is one of the top Harvard professors, and one of the top legal minds in the country.

Mr. BELLOTTI. Yes. He was an experienced expert in constitutional law. But he still charged for 65 hours to prepare for one of his appellate arguments, not including the time spent on his brief. That is a lot of time. The Massachusetts taxpayers were asked to pay for on-the-job litigation training.

Senator HATCH. That was to get a liquor license.

Mr. BELLOTTI. Yes. We had a liquor license statute in our State that provides if you try to get a liquor license to serve liquor within 500 feet of a school or place of worship, that the school or church could object. The Supreme Court found that was unconstitutional. It had been in existence for 75 or 100 years. It was a close question; the statute had been upheld by the State supreme court and one panel of the U.S. Court of Appeals. But when I am faced with a similar case in the future, I have to worry about getting hit with $400,000 paid at the rate of $412 an hour, and then pay for all the time on top of that to litigate what the fee should be. I have to think twice about defending those guys in my State.

[Prepared statement follows:]

PREPARED STATEMENT OF FRANCIS X. BELLOTTI

Let me begin by thanking the subcommittee for once again inviting me and other representatives of the National Association of Attorneys General to share our experiences and thoughts about attorneys' fees and the need for legislative reform in this area. I might add that attorneys' fees has become a bipartisan issue in the Association, enjoying a degree of unanimity which is as encouraging as it is rare. Active support for the Association's position comes from all parts of the philosophical spectrum -- including liberals, moderates, and conservatives.

This bipartisanship is not surprising, however, because as State attorneys general, we are in a unique position to observe the actual operation of fee-shifting statutes, particularly 42 U.S.C. §1988. We have experienced an explosion of fees litigation, particularly since the Supreme Court's decision in *Maine v. Thiboutot*. Virtually any lawsuit against a State or local government, no matter how remote from traditional notions of civil rights, exposes the taxpayers to fee liability -- even if the plaintiff does not prevail on his federal law claims.

We have struggled with that most useless of standards -- "a reasonable attorney's fee" -- in thousands of cases annually. We have seen the outrageous amounts of fees requested by some attorneys, very often exceeding by 500% the value of the underlying case. We have seen the direct consequences of attorney's fees awards on state and, especially, local budgets. We have experienced the indirect and unforeseen side-effects which the threat of large, sometimes crippling, attorney's fees awards have on the governmental decision-making process. And we have had to devote increasingly large amounts of attorney and staff time to fee litigation. The enactment of clear legislative standards would drastically reduce this socially useless type of litigation.

The Association has discussed these and other findings in comprehensive detail in its 1984 Report to Congress, which, I note, was included in the Congressional Record when S. 1580 was filed.

But the perspective of the State attorneys general is not based exclusively on the litigation of fee requests. We are public officials, accountable to the citizens of our respective States, and we are responsible for protecting tax dollars and the civil rights of our citizens. These are not mutually exclusive objectives. I reject the notion that our commitment to assuring the civil rights of the people is to be measured by our generosity to their lawyers. Just as the defense of this country is not enhanced by the military paying $500 for a $10 hammer, the private enforcement of civil rights is not advanced by paying lawyers in excess of what is sufficient to attract competent legal services. We believe in providing medical care to the poor and elderly, but the Congress wouldn't dream of allowing the taxpayers to be charged whatever the doctors thought was "reasonable." There are ascertainable standards which guide medical payments under federal programs.

I believe there should be legislatively determined standards for attorneys' fees as well and that's why I'm here this morning. The bill before the subcommittee, S. 1580, may not be perfect, but it takes some long strides towards achieving the goal of greater certainty and equity in the application of fee-shifting statutes. One simple and helpful provision of the bill abolishes bonuses and multipliers -- these are perhaps the most unmanageable wild cards in the fee-setting process. As I said last year when I testified on S. 2802, bonuses and multipliers are nothing more than "tips" which are added on to the figure which is obtained from multiplying a reasonable hourly fee times a reasonable number of hours. Whatever the practice might be among lawyers billing private clients -- and

I wonder how long a private client would retain a lawyer who doubled or tripled his bill just because he thought the case was riskier than others -- there is no place for such "tips" over and above the reasonable fee which the taxpayers already are obliged to pay.

There are many other provisions of the bill which are worthy of support, and there are a few which I might draft differently. I would welcome the opportunity to work further with the Congress and others on both sides of this issue to improve and strengthen the bill. However, I would like to devote my remaining time to the aspect of the bill that has attracted the most attention -- the $75 cap.

I think it is important to separate two issues here. The first is whether we should move towards the standardization of rates. The second is what the standard should be.

The case for standardization of hourly rates is made in a recent Report of the Third Circuit Task

Force on Court Awarded Attorneys Fees. The Report finds that one of the more time-consuming aspects of the calculation of a "reasonable" fee under current practice is the necessity of determining the billing rate for each lawyer based on the nature of the work performed.

The Report states, and I quote:

> Not only does this exercise consume significant quantities of lawyer and judge time, but it has proven to be an extremely unpredictable endeavor. Variations in rates from case to case, from judge to judge, from court to court, and from lawyer to lawyer, have been commonplace. Moreover, the current system seems to create an incentive in some lawyers to advance the highest possible billing rates, even though many of them, because of the nature of their practices, really do not charge anything that might be termed a "customary" or "normal" billing rate.

Now, assuming that a standard "presumptively reasonable" fee is desirable, and I firmly believe it is, what should the standard be? Recognizing that some measure of arbitrariness is unavoidable, I believe that $75 per hour is a reasonable figure.

First, the $75 figure is equal or comparable to the top rates ordinarily available from the federal government under the Equal Access to Justice Act and the $60 per hour rate allowable under the Criminal Justice Act. I believe the States and local governments should be exposed to the same hourly rate liability as Congress has recently determined to be reasonable in awards against the United States.

Second, the views of the American public should be taken into account. There are not many taxpayers outside the walnut-panelled walls of private law firms who would regard $75 per hour as outrageously inadequate compensation for anyone.

Third, the sole criterion should be what is necessary and adequate to attract competent counsel. The national expert whose normal billing rate is $500 per hour or the law firm whose billing rates are designed for clients like General Motors should not expect the taxpayers to pay the "customary" rate for their services. I don't pretend to know what is adequate to attract competent counsel in all areas of the country, but I know that $75 is sufficient in Massachusetts. In fact, the Massachusetts Lawyers Weekly, a legal newspaper in my state, recently editorialized in support of Senate 842, a bill that would authorize attorneys fees in special education cases. The editorial said, and I quote:

> The proposed legislation sets a $75/hr. limit on the fee award, a figure borrowed from the federal Equal Access to Justice Act. No one is going to become rich on this piece of

legislation; fee awards will be moderate in today's market, but still sufficient to attract competent counsel.

I believe that is what Congress should be doing in all of the fee-shifing statutes -- it should authorize moderate awards which will be sufficient to attract competent counsel to take these cases. In those few geographic areas where $75 may be insufficient -- New York or Los Angeles perhaps -- the legislation might authorize the district court to raise the cap by local rule if it finds -- based on facts on the record -- that $75 is insufficient to attract competent counsel.

I would like to conclude my remarks by emphasizing that I have no quarrel with the fundamental proposition of the Attorneys' Fees Act: where a public defendant has infringed on a citizen's civil rights, the citizen should not be precluded from seeking vindication because he cannot afford competent counsel. This was Congress's original purpose and I urge the Congress to do nothing to steer away from that objective. But I fear that because of §1988's lack of standards, the original idea has been buried in major efforts to obtain big fees. Those efforts spawn wasteful litigation that disserve the American public. I am convinced that the only way to restore the original intent is for Congress to enact standards that will maximize certainty in the application of §1988 and similar statutes. Only then will the courts, as well as the plaintiffs' and defendants' bar, be able to spend less time litigating over fees and more time on the substantive issues of proper concern to the public.

Thank you.

Senator HATCH. It is a very good point. Thank you.
General Jones.

STATEMENT OF JIM JONES

Mr. JONES. Thank you, Chairman Hatch. It is a pleasure to be here. I appreciate the opportunity to discuss with you the very serious concerns that we have as members of the National Association of Attorneys General with the Federal fee-shifting statutes, particularly 42 U.S.C. 1988.

As General Bellotti indicated, it is very frustrating to be faced with financing both sides of this litigation on the merits, and also be faced with financing both sides of the fee litigation which seems to consume almost as much time as the merits litigation.

When the statute passed, section 1988, in 1976 I think most members of the association applauded it. It was viewed as a means of giving court access to disadvantaged people to have their civil rights vindicated, but it has become much more than that. It has become not only an incentive to pursue meritorious civil rights claims; it has also become a powerful incentive to pursue legal fees for a raft of causes—concerning civil rights issues, others not.

We have seen that in Idaho and in other jurisdictions. One of the most frustrating things that I have seen is the tendency by a number of plaintiffs' attorneys to plead a classic cause of action for negligence, or some other commonplace cause of action, and then append to that complaint a claim of denial of due process, or some other constitutional claim, so they can wangle an award of attorney fees, and it happens time and time again. I have attached some recent newspaper clippings from Idaho indicating the types of claims asserted—the confiscation of a bicycle, the unseating of a horseman—all purporting to be claims of basic violations of civil rights.

In the articles, there is a claim for denial of civil rights in connection with the Idaho Insurance Department's regulation of an insurance carrier and a claim for section 1988 attorneys fees in a successful challenge by major pay television companies against Utah's cable television decency statute. I do not think Congress intended that section 1988 should apply to cases of this nature, but it is being so applied by the district court, and I think it is something that has to be addressed by Congress, because Congress is the one who opened the Pandora's box.

Recently in the State of Idaho there has been a major crisis with respect to insurance for governmental entities—cities, counties, and even the State government have had their insurance canceled. We have managed to extend our coverage until the end of the year. One of the reasons for the crisis is the increasing liability of governmental entities for attorneys' fees in civil rights claims. Insurance companies do not want to get stuck holding the bag. They have either canceled coverage or they have indicated that they are going to double, triple, or even quadruple our insurance rates, so they can take into account those fee awards that are being granted.

We do not know what the next day is going to bring with respect to our liability exposure or whether we are going to be brought to financial ruin by these judgments. We have got to have some assurance that there is going to be a cap—some standard that we can plan for and live with, and something yet that will not keep meritorious civil rights claims out of the courts.

I would like to tell you just one recent experience that we have had that sort of typifies many of the problems that we are concerned about. In 1984, after some fairly extensive negotiations with the Youth Law Center in San Francisco, an agreement was reached between the State of Idaho and the Youth Law Center to improve conditions at the Youth Services Center, which is the place in Idaho where wayward juveniles are placed for rehabilitation. Conditions there were not what they should have been, and the State recognized it and worked with the Youth Law Center to try to remedy conditions. The State did so and the district court found, when it recently decided the case that was filed in 1984, the conditions that were being complained about had been remedied prior to the institution of the suit.

An agreement was made on how to improve the conditions and appropriate remedial action was agreed upon by the State. A suit was then filed primarily for the purpose of collecting attorney fees. After a 9-day trial and a year of litigation, the Youth Law Center prevailed on part of one of nine issues involved in the litigation. The point that they prevailed upon was an acknowledgment from the district judge that the terminated practices had indeed been a violation of the civil rights of the clients out at the Youth Services Center. But again, the judge found that those practices had been terminated prior to the filing of the lawsuit. On eight other claims in the complaint, the Youth Services Center was vindicated. The plaintiffs did not prevail in any fair sense of the term, yet a bill for about a quarter of a million dollars in attorney fees has been submitted. The district judge held that, because they did prevail with respect to his acknowledgment that the past practices had been violations of their civil rights, they were the prevailing party and we may consequently have to pay substantial attorneys' fees.

Now, it is very difficult to be able to determine how much you should settle for or whether you should settle when you are faced with that kind of ruling, and when there may also be bonuses, multipliers, and rates well in excess of $75 an hour. We pay our attorneys an average of $16 an hour to resist those claims so the other side should have some reasonable limit on their fees. We do not have any problem with the $75 per hour cap, but I think the important point is there has got to be some cap of some amount. Let us give plaintiffs the ability to come into court and vindicate their rights, but let us know what our liability may be for attorneys' fees, so we can get some of these cases settled.

I think the standards set in the bill are certainly adequate. There are some areas that may be improved upon, but if we can just get the standards and know what liability we are facing, I think we will be better able to settle cases and reduce the congestion in the courts. It will do away with much costly and time-consuming litigation including fee litigation and allow us to get on with the business of improving conditions in State institutions.

[Prepared statement follows:]

PREPARED STATEMENT OF JIM JONES

Chairman Hatch, other members of the subcommittee:

I am Jim Jones, Idaho Attorney General. I appreciate the opportunity to appear here today with Attorney General Bellotti to express the very serious concerns held by the members of the National Association of Attorneys General with respect to the operation of federal fee-shifting statutes, particularly 42 U.S.C. Section 1988.

One of the most perplexing problems confronting state and local governments today is their ever-increasing liability for attorneys fee awards in cases styled as civil rights actions. When Congress passed the Civil Rights Attorney's Fees Award Act of 1976, authorizing awards of "reasonable" attorney fees to successful civil rights litigants, Congress inadvertently opened a Pandora's Box to litigation which has placed an increasing economic burden on state and local governments. Members of our association do not oppose the intended purpose of that legislation--to encourage competent representation for those denied their basic civil rights. We have no quarrel with this meritorious purpose but we strongly believe that appropriate limitations must be placed on fee awards. Pursuant to Section 1988, fees have been awarded for cases which are only remotely connected with vindication of civil rights, in cases where the plaintiff accomplishes very little in the way of success, and in amounts which are exorbitant in comparison with the result obtained. Unless appropriate standards are imposed by the Congress, state and local governments may well be pushed to the brink of financial ruin.

When Congress authorized attorneys fees for pursuit of civil rights claims, claimants began finding civil rights violations in cases where they had never before even been suspected. Cases in which 1988 attorneys fees have been sought and awarded include many which are only remotely connected (if at all) to violations of basic constitutional guarantees. Many attorneys have adopted the practice of alleging a customary cause of action for negligence, denial of a building permit, wrongful discharge from employment, or any number of other causes of action, and then attaching an additional claim of violation of due process in hopes of being able to wangle an award of attorneys fees under Section 1988. I have attached articles describing an assortment of these claims in Appendix "A". They include a claim of denial of civil rights for the alleged confiscation of a bicycle, a claim for denial of civil rights in connection with the Idaho Insurance Department's regulation of an insurance carrier, a claim for 1988 attorneys fees in a successful challenge by major pay television companies against Utah's cable television "decency" statute, and a claim for civil rights damages and attorneys fees in connection with the alleged unseating of a horse rider in Coeur d'Alene, Idaho. The proliferation of marginal civil rights claims and the increasing liability of state and local governments for attorneys fee awards in these cases has had a serious effect on the finances and insurability of state and local governmental units throughout the nation.

Due in no small part to the proliferation of Section 1983 and 1988 attorneys fee claims, a governmental insurance crisis has been precipitated in Idaho and virtually every other jurisdiction in the country. Governmental entities in Idaho and many other states have recently been informed that they are either not insurable or that continued coverage will entail doubled or tripled premiums. Articles such as those appended to these remarks as Appendix "B," outlining the alarming nature of the insurance crisis, are commonplace in today's papers. Idaho has managed to gain an extension for existing policies for several hundred units of local government, as well as for the State of Idaho itself, until the end of year but the crisis is by no means resolved. When one of the major carriers was informed that the loss experienced in

Idaho did not justify dramatically increased insurance premiums and that the State was contemplating legislation to reduce liability exposure under the State's Tort Claims Act, the response was that this would still not solve the major liability problem posed by claims for "civil rights" suits and related attorneys fees.

The need for reform, including guidelines for the award of fees, is clear. Governmental entities must know the limits of their liability in considering a claim so that they will know when and how to settle, as well as when to litigate. They need assurance that they can avoid liability for fees when resisting a meritless claim. Two articles attached as Appendix "C" illustrate some of the difficulties under the present state of affairs.

In June of 1984 a lawsuit was filed against the State of Idaho over unseemly conditions and practices which had previously existed in Idaho's Youth Services Center. As indicated in the June 29, 1984 article from the Twin Falls TIMES NEWS, the conditions and practices had been generally eliminated pursuant to negotiations between the State and the public interest law firm which represented the Center's residents prior to initiation of the suit. However, the spokesman for the law firm indicated that it desired judicial approval of the agreement. Litigation followed and culminated in a 9--day trial in which the plaintiffs secured nothing except an acknowledgement from the judge that the past practices and conditions were violative of the rights of the residents of the Youth Services Center--which condition the State had willingly remedied prior to institution of the suit. The claimants received something more important as a result of the litigation (although virtually all of their claims were denied by the district judge) and that was "prevailing party" status. Based upon such status a claim for $234,997 in attorneys fees and costs was presented by the plaintiffs for the litigation--litigation which was pointless except to secure an entitlement to attorneys fees. Since state government in Idaho operates out of a fixed pie of governmental funding, any attorneys fees which may be awarded to the plaintiffs for this pointless litigation will come at the expense of funding which could be utilized for betterment of conditions for other institutionalized persons in the State. As is so often the case in litigation of this nature, the more money paid in attorneys fees, the less money available for services to institutionalized or disadvantaged persons.

In order to remedy the problems which have been caused for state and local governments by Section 1988 and other fee-shifting federal statutes, standards such as those proposed in S. 1580 are essential.

The cap of $75 per hour proposed in S. 1580 is appropriate and certainly adequate to insure competent counsel for legitimate civil rights litigants in most jurisdictions. This is especially true when we consider that the attorneys resisting this litigation in most jurisdictions will only be earning a fraction of the $75 per hour cap. Although I acknowledge that we in Idaho are toward the bottom of the pay scale for Attorneys General offices, I can tell you that the hourly salary for Deputy Attorneys General in Idaho ranges from $9.72 per hour to $22.77 per hour with the average salary in the range of $16.00 per hour. In those areas where the cost of competent legal counsel generally exceeds the $75.00 cap, a procedure could be established whereby the cap could be raised by local rule on a case-by-case basis upon a finding of necessity by the local district court.

The prohibition of bonuses and multipliers in S. 1580 is well founded. If the objective of Section 1988 is to insure competent counsel, there is no compelling justification to allow these added rewards. They penalize governmental entities while satisfying no valid social purpose.

The limitation of fee awards to instances where the plaintiff has actually prevailed and to work performed on issues where the plaintiff has prevailed is essential. The Youth Services Center case described in Appendix "C" illustrates compelling need for such limitations. These limitations would encourage the settlement of meritorious claims and prevent frustrating, costly and time-consuming litigation over attorneys fees where the plaintiff has not obtained any meaningful results.

With these types of limitations, state and local governmental entities can be protected against unwarranted intrusions into their treasuries while allowing meritorious civil rights litigation to proceed. I reiterate, as did Attorney General Bellotti, that our effort is not directed against those who need a means to vindicate their constitutional rights and protections. This is a worthwhile purpose which should not be inhibited. Properly defined limitations will not act as an inhibiting factor for meritorious civil rights but, rather, will reduce the chances of litigants of marginal claims reaping great financial rewards at the expense of the average taxpayer. Corrective legislation is essential and the members of the National Association of Attorneys General stand ready to support and assist this subcommittee in getting such legislation enacted.

$4 million suit against city dismissed

By PAT MARCANTONIO
Times-News writer

TWIN FALLS — A $4 million lawsuit against the city of Twin Falls was dismissed Monday because the plaintiff failed to follow court rules before filing his claim.

Arlo R. Kent of Twin Falls sought damages from the city and two Twin Falls Police officers in a claim filed Aug. 26 in 5th District Court. Kent alleged his family's constitutional rights were violated when officer Kevin Davis illegally confiscated Kent's son's bike Aug. 24. Thomas Kent, another plaintiff in the case, alleged that a jail trustee claimed the bike belonged to him.

His son was denied due process of the law and equal protection under the law, Kent alleged. As a result, he and his son suffered mental anguish because their rights were denied.

Davis' supervisor, Tom Ramsey, also was named a defendant.

At a Monday hearing defense attorney Kevin Trainor asked Judge Daniel Meehl to dismiss Kent's claim on the grounds it was "premature." Kent, who represented himself, had failed to follow the rules of the court before he filed the lawsuit.

The plaintiff didn't post a bond that is required by law when people intend to sue law enforcement officers, Trainor said.

Kent also failed to file a notice of claim with the city before taking the matter to court, Trainor said. When a notice is filed with the city, it has 90 days to respond, he said.

Kent had asked for $4 million in damages. The law, however, limits damages to $500,000 in this case, Trainor said. The request showed "just how frivolous this is."

Trainor also asked the court to order Kent to pay the city's attorney's fees "to prevent this type of claim."

Because the subject matter dealt with a federal statute pertaining to civil rights, the District Court had no jurisdiction, Trainor added.

The law also protected officers from liability claims when they took property in the course of their duties, Trainor said.

In response, Kent quoted several federal and state statutes. He argued that a lower court judge could maintain jurisdiction in the case based on its merits.

Meehl sided with the city and dismissed the action because Kent failed to file the required bond.

Idaho Press-Tribune, Sunday, May 26, 1985 — 3A
Caldwell, Idaho

Idaho, Montana insurance regulators sued

BUTTE, Mont. (UPI) — Idaho and Montana insurance regulators conspired to destroy Life of Montana, say attorneys for the insurance company headquartered in Bozeman, Mont.

A $10 million damage suit filed in federal court in Butte, Mont., also charges the company was the victim of state officials' libelous statements that the company was insolvent by more than $9.7 million and unable to meet contract demands of policyholders.

The suit names Idaho Department of Insurance officials Layne L. Seward, director, and Larry E. Cross, chief examiner, along with their counterparts in the Montana Department of Insurance, Terrance J. Meagher, former chief examiner, and E.V. "Sonny" Omholt, former Montana auditor and insurance commissioner. Also named in the suit is Sierra Life Insurance Co. of Twin Falls.

Meagher began plotting destruction of Life of Montana last year, the suit alleges, because of a long feud between him and the company's management. Meagher and Cross conducted telephone conversations in June and August last year in their plot to destroy Life of Montana and cause the failure of Sierra Life, the suit charges.

Vol. 79 No. 48 Coeur d'Alene, Idaho Thursday, September 26, 1985

Coeur d'Alene Press

City stands to lose insurance

By RIC CLARKE
Press City Editor

The city of Coeur d'Alene, still battling a highly publicized $750,000 damage claim, may soon lose its insurance protection from similar lawsuits.

City Administrator Eugene McAdams confirmed Wednesday that Coeur d'Alene's insurance package will expire Monday, and protection against liability for the 1985-86 fiscal year has been unavailable.

Of particular concern to McAdams is the loss of coverage for errors and omissions, general liability and police liability, a development that could significantly affect city business.

McAdams said the city's insurance broker, Fred S. James and Co., has exhausted all potential sources in this country and currently is negotiating with Lloyd's of London in Great Britain.

"We've got an all-out effort going to become insured," McAdams said. "We're optimistic, but we don't know..."

Without liability insurance the city may have to "severely curtail" operations, he said, and avoid decisions on issues that involve controversy.

Some officials may decide to leave city employment, as they could be held personally responsible in a damage suit against the uninsured city, McAdams said.

"If we're unable to secure insurance then the City Council has some difficult decisions to make," he said.

The city administrator said Coeur d'Alene's insurance problems are not unique.

Low interest rates, which limit insurance companies' return on investments, and the "penchant of today's society to sue for just about anything" have caused insurance premiums to soar and companies to be hesitant to contract with cities.

Coeur d'Alene's rates have jumped from $58,000 in 1984-85 to an estimated $160,000 for 1985-86, he said. But even with twice the amount budgeted, Coeur d'Alene is unable to find anyone willing to risk insuring the city.

While McAdams blames the problem on factors beyond the control of City Hall, plaintiff Duane Rozsnyai believes the city's mishandling of his lawsuit has caused insurance companies to shun Coeur d'Alene.

Rozsnyai filed a civil rights violation claim last year in federal court following an incident in which he allegedly was pulled from his horse by city police.

He later sued the city in 1st District Court after city officials failed to respond to his satisfaction on a $100,000 tort claim he filed in August 1984.

A jury trial is pending on the $750,000 lawsuit against Coeur d'Alene in which Rozsnyai claims he suffered serious injuries to his groin, nerves, arteries and circulation of his left leg.

The 39-year-old Coeur d'Alene resident says his horse was beaten with a night stick and service revolver by a police officer who mistook him for a Montana mountain man wanted for murder.

Rozsnyai claims he suffered the injuries when his horse reared as a result of the police action and he was "ejected" from the animal.

The plaintiff, who says the injuries have prevented him from returning to work, now lives in a tent and is receiving national media attention.

McAdams this morning scoffed at the notion that the damage claim has affected the city's ability to buy insurance.

"I just don't think his situation is of such grave import," McAdams said. "We're talking about a national crisis in terms of small cities getting insurance."

The Associated Press reported this morning that the Idaho cities of Wilder and Greenleaf are considering disincorporating because of rising liability insurance rates that make it impossible to afford coverage.

McAdams said the Association of Idaho Cities currently is considering developing a premium pool into which a number of small cities will contribute to attract an insurance company on a mutual basis.

"I'm hoping it'll come back in the future, but right now the well is dry," he said.

A spokesman for the company from which the city buys insurance, Public Entities National Co., was unavailable for comment this morning.

State must pay bill in cable case

Idaho Press-Tribune, Caldwell, Idaho

SALT LAKE CITY (AP) — A federal judge has ruled that Utah must pay legal fees to the cable television companies which challenged the state's 1983 cable decency statute.

In a seven-page ruling issued Friday, Senior U.S. District Judge Aldon J. Anderson ordered the state to pay reasonable attorneys' fees to the companies, which included cable giants Home Box Office and Tele-Communications Inc.

The ruling marked another defeat for the state in its battle over the 1983 Utah Cable Television Programming Decency Act, which created civil penalties for cable operators who broadcast sex, nudity or profanity on cable television.

In April, Anderson ruled that the law violated First Amendment guarantees of free speech, was "unconstitutionally overbroad and vague, and void on its face," and is superseded by federal cable regulations.

The state, which is appealing the earlier ruling, also will appeal Friday's decision, said Assistant Utah Attorney General Robert Parrish.

Attorney Brian McDougal, who represented the cable companies, said the specific amount of fees would be determined after the state's appeal is resolved.

APPENDIX "A"

Cities, counties get reprieve on insurance

Insurer to extend coverage in Idaho

The Associated Press and Statesman staff

Threatened with a flood of lawsuits, one of the largest providers of liability insurance for local governments in Idaho on Monday agreed to extend coverage through the end of the year for all its customers in the state.

Scott Wolfley, deputy attorney general for the state Department of Insurance, said Home Insurance Co., based in New York, would extend its coverage for about 70 government entities in Idaho through Dec. 31. Many of those policies were among hundreds around the state due to expire at midnight Monday.

The action came in the wake of Friday's decision by a 1st District Court judge granting the Post Falls Highway District a temporary restraining order blocking Home Insurance and Home Indemnity Co., also of New York, from not renewing the district's liability coverage. A hearing to consider a preliminary injunction

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6A Idaho Statesman, Boise, Idaho THE IDAHO ST.

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Insurance

Continued from Page 1A

was scheduled for Friday.

On Monday, a 6th District judge in Pocatello issued a similar order against Colonial Penn Insurance Co., Philadelphia, barring it from dropping Bannock County's liability coverage, Wolfley said. Other counties, cities, highway districts, school districts and other public entities in the state were considering similar action, he said.

Ada County Purchasing Director Robert Oakes said Monday that as of midnight the county would be without liability insurance for any of its agencies.

"We've tried everything," he said, adding that he would continue to look for insurance. He said he may consider participating in an umbrella-insurance program that the Idaho Association of counties is trying to organize.

Wolfley said the state planned to press its case with Colonial to grant an extension of policies for the approximately 40 local governments it insures in Idaho.

"In the short term, we're hoping that when the companies realize this is causing problems, when they start getting hit with court orders, that they'll reconsider and provide alternative coverage," he said.

But the short term may not be short enough for local officials facing the specter of lawsuits with no insurance protection. Some have threatened to resign rather than face personal liability claims. In all, Wolfley said about 200 public entities were looking for a way out from under the liability squeeze.

At the request of Wayne Soward, director of the state Department of Insurance, some smaller insurers earlier agreed to renew or extend coverage in Idaho until after the beginning of next year. Home Insurance was the first large carrier to agree to an extension.

But before court action, both Home and Colonial flatly refused to do any more such business in the state.

"They have identified Idaho as a throwaway state as far as premiums go," said Chuck Holden, executive director of the Idaho Association of Counties. "It's easier for them to reduce their premium intake and therefore the risk."

Idaho's Tort Claims Act limits a public entity's liability in most civil claims to $500,000. The law does not apply to violations of civil rights, but most officials have said Idaho's loss record in recent years has not been that bad.

"That tends to support the notion a lot of us have that we in Idaho are paying for losses that are being incurred across the country," said Jim Weatherby, executive director of the Association of Idaho Cities.

Since even the long-term future of the insurance industry relative to local governments appears murky, Holden said his group is putting together an insurance pool for interested counties.

Boise, Idaho Statesman 10-2-85

Judge orders firm to insure cities

The Associated Press

POCATELLO — A 6th District Court judge issued a temporary restraining order Tuesday against Colonial Penn Insurance Co., requiring it to continue liability insurance coverage for more than 90 local government entities in Idaho that feared their policies had lapsed 15 hours earlier.

The order against the Philadelphia insurance company signed by Judge Peter McDermott keeps the policies in effect until Oct. 14. It also ensures continued liability coverage for the state, which had a Colonial Penn policy.

"The company will not extend these policies voluntarily, and they've acted cavalierly in this case," said Deputy Attorney General Scott Wolfley, who coordinated the class action suit that prompted McDermott's order.

"I've told them that if they don't take this seriously, we're ready to conduct the war," Wolfley said, adding that the lawsuit may persuade Colonial Penn to extend coverage voluntarily to the end of this year, as other companies have agreed to do.

In addition to seeking court-ordered extension of their policies, the 92 cities and counties asked the court for $50 million in damages and $50,000 in attorneys fees from the company. McDermott has not scheduled a hearing on extension of his order or the merits of the damage claim.

Colonial Penn has stood alone among the liability insurance companies providing coverage to local Idaho governmental entities in refusing to relent on its midnight Monday cancelation of expiring liability policies. Company officials have relied firmly on contract provisions allowing cancelation with a 30-day notice.

"They knew what kind of position they were

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putting these people in," Wolfley said. "They knew these cities and counties couldn't find new insurance in 30 days, and they knew they were going to do this six months ago, but they waited to tell these people until just 30 days before."

The disruption in coverage, even if only momentary, had left local officials facing the possibility of lawsuits without protection. They had been warned to take no controversial actions until coverage was assured, and in southeastern Idaho, the city of Ammon delayed the start of its own police force Tuesday because it could not get liability coverage.

Some local officials have threatened to resign rather than face personal liability for official actions.

In what is being described by state officials as a business decision to pull out of Idaho, over 200 local governmental entities faced Tuesday with no liability coverage as their existing policies were set to expire at midnight Monday.

But successful legal action to force extensions by some and the threat of similar retaliation by others prompted all companies but Colonial Penn to agree, before the policies lapsed, to extensions through the end of this year at what Wolfley said could be "a modest increase in rates."

"By Jan. 1, hopefully we can find them alternative coverage," he said.

Of the others granting extension, Home Insurance Co. of New York was the largest, covering some 70 governmental units

APPENDIX "C"

A-8 Times-News, Twin Falls, Idaho Friday, June 29, 1984

Idaho

Suit on alleged misconduct at youth center shocks Evans

GOV. JOHN EVANS
Promises stiff remedies

By BOB FICK
The Associated Press

BOISE (AP) — Contending legal action was taken only to "spotlight" the problems of young people in Idaho Gov. John Evans says the state will keep working with a San Francisco law group to improve conditions at the Youth Services Center in St. Anthony.

Evans said Thursday he was totally surprised by the federal suit alleging illegal and unconstitutional practices of punishment at confinement at the juvenile detention facility, filed by the Youth Law Center.

"We thought, quite frankly, that we had resolved it," the governor said of months of negotiations with center representatives that have been punctuated by threats of legal action.

'Everything they had done and were doing we thought was acceptable to the law center'
— Governor Evans

"Everything they (at the facility) had done and were doing we though was acceptable to the law center," he said. "We've been doing everything they've been recommending. We had changed the management process of how we handle the youth at the center."

Law Center attorneys acknowledged that many problems at the center have already been resolved and that others can be before hearings on their suit open in U.S. District Court.

But Elizabeth Jameson said the center representing the juveniles at the facility, wants judicial approval of the final agreement over Youth Services Center practices.

September 18, 1985 — 2A Idaho Press-Tribune, Caldwell, Idaho

Judge to settle expenses in YSC suit

BOISE, Idaho (AP) — Who won a lawsuit over conditions at the Youth Services Center, a state facility for wayward youth at St. Anthony?

The Youth Law Center claims it won, and wants the state of Idaho to pay $234,997 in legal fees and expenses.

But state attorneys are disputing the claim, saying the San Francisco organization won only half of one of nine claims against the state. The Department of Health and Welfare also says the suit was unnecessary.

Instead of improving conditions at the juvenile center, which was its declared goal, the lawsuit actually hindered progress because of all the time employees had to spend on the lawsuit, the state claims.

U.S. District Judge Ray McNichols, Boise, will be faced with sorting out the competing claims. He has given the Youth Law Center until Sept. 30 to respond to the state's contention that the California organization should get little if anything of its $235,000 claim against the state.

On June 24, 1984, the Youth Law Center, which advocates the rights of juveniles in legal matters, filed a lawsuit. It alleged the Youth Services Center was overcrowded, had few facilities and residents were being mistreated.

Among the allegations was a claim that a center built for 130 to 135 people had an inmate population up to 170; that wayward youth were often handcuffed, confined in solitary isolation for weeks at a time and forced to "sit chair" or "stand wall" against a wall up to 16 hours at a time as disciplinary measures.

Health and Welfare did not dispute some of the allegations, but based its defense on the claim the practices had been abandoned long before Youth Law Center filed its lawsuit.

McNichols ruled that practices such as "standing wall" were unconstitutional and a violation of residents' rights.

But he refused to issue an injunction barring the practice. He ruled that it appeared the practices had been stopped, and an injunction was unnecessary.

McNichols ruled against eight other counts of the complaint.

Youth Law Center, the National Center for Youth Law and Idaho Legal Aid Services submitted bills for legal fees, at up to $85 per hour, and expenses.

But the state's response, prepared by Deputy Attorney General Michael DeAngelo, attacks the claim on a variety of grounds. It contends that if any legal fees are awarded, they should be only those directly associated with the count that McNichols upheld.

Ray Givens, Coeur d'Alene, conducted the state's defense, but withdrew from the case Aug. 21 and was replaced by DeAngelo.

The state also argues that the lawsuit was unnecessary, because the practices under scrutiny already had been stopped. McNichols in his ruling noted specifically that as of June 24, 1984, the date the lawsuit was filed, there was no evidence that the improper practices still existed.

Senator HATCH. We are going to look thoroughly at both of your statements. To the extent that both of you have indicated that we might fine-tune this bill a little bit, I would like to have your suggestions. I have great respect for both of you. Let me ask one question.

S. 1580 limits the amount paid to counsel to $75 an hour. This bill would not, however, mandate the level that States may compensate outside counsel. Does this pose a problem? Will unfairness result if the States have no limits on hiring outside counsel at the same time that they will only compensate prevailing plaintiffs at a rate of $75 an hour?

Mr. BELLOTTI. Mr. Chairman, I do not see that as a problem. The only time you ever pay rates in excess of that amount, and I cannot ever remember doing it in my office, is when you have a particular case requiring an expert in a particular discipline. That is not in civil rights cases.

Furthermore, when you do contract with an outside specialist, you retain control. You control the lawyer's fees either by paying a flat fee or if you are paying him by the hour, by limiting the number of hours. You do not have multipliers in those cases, either. In the cases we're complaining about, the whole thing is wildcat. I see nothing in the cap that that would make this unfair at all.

Senator HATCH. Do you feel the same way?

Mr. JONES. Yes, Mr. Chairman. I have to satisfy my joint finance committee that I am spending my money wisely. The only time I hire outside counsel at high rates is when we have a problem like we have with Oregon and Washington on our fish allocation in the Columbia River—something that we cannot adequately attend to ourselves. We certainly would not hire expensive outside counsel when we can hire counsel to defend these cases for $16 an hour, and do a fairly competent job of it. We are not going to pay $75 or $100 an hour for civil rights litigation because our legislature would take a very dim view of that.

I should point out the unfortunate fact that the Idaho Department of Health and Welfare has independent statutory authority to hire outside counsel and did so to assist in the defense of the *Youth Services Center* case which I have previously mentioned. I object to this type of practice and have continually advanced the position that neither the department of health and welfare nor any other State agency should have the ability to secure counsel other than through my office. In any event, an outside attorney was employed to assist in the case and although I do not know what his hourly rate of compensation was I suspect it was around $75 per hour. Following the trial I publicly expressed my dissatisfaction with the work which he performed on the case, the amount he was paid by the department, and the fact that outside counsel was utilized. The experience which resulted from this case makes it very unlikely that outside counsel will again be secured in this kind of case in the State of Idaho, even by the two State agencies which have statutory authority to hire outside counsel.

Senator HATCH. Coming from important States of both a rural and urban nature, your testimonies are very valuable. Furthermore, I think most attorneys general would agree that with the $75 an hour fee, you can find some very competent lawyers to handle cases in every State of this Union.

Mr. BELLOTTI. Mr. Chairman, I ran my own office for over 20 years. I made a great deal of money and I know the kind of fees that you have to charge to make money.

These are windfalls.

Senator HATCH. I appreciate both of you coming, and we are going to submit questions to you in writing and hope the answers are returned as soon as possible.

Mr. BELLOTTI. One last thing. You asked a question and I do not think we answered it. How we might change this bill.

The 25-percent reduction provision does not matter to me in the least whether that is in there or not. I think Attorney General Jones feels the same way.

The other thing that is missing for us is included in the Equal Access to Justice Act. That is if you have substantial justification or a good faith defense to the case. If you were defending in good faith or with substantial legal justification you should not be assessed the attorneys' fee.

As for the cap, as I stated earlier, I can speak for Massachusetts, which is a fairly urban area the $75 standard would be adequate. Maybe New York or Los Angeles would need more than $75, and you could give the district court discretion to raise that by local rule, where it is proven in the record that $75 is not enough to attract competent counsel.

But I would be surprised if you could find that——

Senator HATCH. Our feeling is that you can find competent counsel at that price.

In any event, thank you both for coming.

Our next two witnesses will be Mr. Gary D. Slaiman on behalf of the American Bar Association and Mr. Richard P. Fajardo, acting associate counsel of the Mexican American Legal Defense and Educational Fund.

Gentlemen, I have to leave here no later than 5 minutes to 12 due to a public debate commitment that cannot be changed or postponed. Therefore, I can only give each of you 5 minutes for oral testimony.

We will place your full statements in the record, and it will be kept open for any additional statements you would like to insert.

Mr. Slaiman.

STATEMENT OF PANEL CONSISTING OF GARY D. SLAIMAN, AMERICAN BAR ASSOCIATION, WASHINGTON, DC; AND RICHARD P. FAJARDO, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, WASHINGTON, DC

Mr. SLAIMAN. Mr. Chairman, and members of the subcommittee, I am Gary Slaiman, a lawyer in private practice and a council member of the General Practice Section of the American Bar Association. I am also chairman of the General Practice Section's Federal Legislation Committee. I am here at the request of the president of the American Bar Association, William W. Falsgraf, to express to you the Association's opposition to S. 1580, the proposed Legal Fees Equity Act.

In July 1985, the House of Delegates of the American Bar Association adopted the following resolution:

> Resolved, that the American Bar Association opposes the proposed Legal Fees Equity Act, (S. 2802, H.R. 5757, 98th Congress), or similar legislation which would impose arbitrary and unreasonable limits on hourly fees for private attorneys that may be recovered from Federal, State, and local governments under fee-shifting statutes.

The association has always been concerned that citizens with important public policy concerns be able to obtain resolution of these concerns through appropriate channels. Toward this end, the private bar has made and continues to make substantial pro bono contributions of legal services to meet the needs of many individuals and groups who would otherwise not be able to obtain access to the justice system. However, it is impractical to think that such voluntary efforts can or should provide the entire manpower to address important constitutional rights and public policy concerns. Congress has recognized in the enactment of scores of fee-shifting statutes that the public good will be served only by providing some reasonable level of reimbursement for those who undertake representation in civil rights, environmental, and other such public cases. A public responsibility requires a public commitment. S. 1580 would effectively take away the Government commitment to ensuring that public interest cases will receive appropriate consideration in the courts.

The bill would alter the current fee structure by:

First, limiting the hourly rate compensation to a maximum of $75 per hour.

Second, eliminating any possibility of upward adjustment or multiplier.

Third, limiting the recovery to less than $75 per hour where that rate unreasonably exceeds the hourly salary of the attorney representing the party (an adoption of the cost-based approach).

Fourth, requiring the plaintiff who recovers a money judgment against a governmental agency to generally apply 25 percent of the money judgment toward attorneys' fees.

Fifth, providing that fees may be reduced if the award would unreasonably exceed the monetary result of injunctive relief achieved or if the prevailing party has engaged in conduct that unreasonably protracted the final resolution of the controversy.

Sixth, altering the test for the award of attorneys' fees articulated in *Hensley* v. *Eckerhart,* 461 U.S. 424, 103 S. Ct. 1933 (1983), by requiring the prevailing parties to have succeeded on significant issues in the litigation in terms of the result sought. (The test in *Hensley* was more broadly defined to include achieving some of the benefits sought by the parties.)

Further, the proposed statute would deny awards of attorneys' fees for services performed after the written offer of settlement if the party rejects the offer and does no better when the case is resolved on the merits.

According to the Justice Department, the purpose of the bill is to:

> Have Congress provide greater guidance to the courts and Federal agencies for the award of attorneys fees pursuant to Federal statute, and to reduce the current uncertainties and disparities reflected in the present decisions.

This rationale for the legislation is undercut in large measure by recent Supreme Court decisions applying fee-shifting statutes in accordance with the direction of Congress. The ABA has recommended, and courts have applied all or most of, the following list of relevant factors in setting fee awards:

One. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

Two. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

Three. The fee customarily charged in the locality for similar legal services.

Four. The amount involved and the results obtained.

Five. The time limitations imposed by the client or by the circumstances.

Six. The nature and length of the professional relationship with the client.

Seven. The experience, reputation, and ability of the lawyer or lawyers performing the services.

Eight. Whether the fee is fixed or contingent. ABA Code of Professional Responsibility, Canon 2, DR-2-106(B) (1969).

Moreover, the Supreme Court has recently clarified in the standards for awarding attorneys' fees in civil fee-shifting statutes. *Blum* v. *Stenson,* supra. *Hensley* v. *Eckerhart,* supra. These decisions make it clear that, whether the prevailing party is represented by private practitioners, or a nonprofit legal organization, reasonable attorneys' fees are to be calculated based upon the prevailing market rate in the relevant community and that upward adjustments of such rates area only appropriate in some cases of exceptional success.

In so doing, the Supreme Court emphasized in the *Blum* case that it was following the direction of Congress (52. L.W. at 4379):

> The Civil Rights Attorneys, Fees Awards Act of 1976, 42. U.S.C. 1988, authorizes district courts to award a reasonable attorney's fee to prevailing civil rights litigants. In enacting this statute, Congress directed that attorney's fees be calculated according to standards currently in use under other fee-shifting statutes: -
>
> It is intended that the amount of fees awarded under (1988) be governed by the same standards which prevail in other types of equally complex Federal litigation, such as anti-trust cases (,) and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson* v. *Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily* v. *Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974); *Davis* v. *County of Los Angeles,* 8. E.P.D. 9444 (C.D. Cal. 1974); and *Swann* v. *Charlotte-Mecklenburg Board of Education,* 66. F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. S. Rept. No. 94-1011, p. 6 (1976).

In all four of the cases cited by the Senate report, fee awards were calculated according to prevailing market rates. None of these four cases made any mention of a cost-based standard. Petitioner's argument that the use of market rates violates congressional intent, therefore, is flatly contradicted by the legislative history of 1988.

Contrary to DOJ's claims, the case law regarding the basis for awarding attorneys' fees is neither confusing nor unclear; the standards for defining a prevailing party for the purpose of securing attorneys' fees has been fully articulated; and the standard for determining attorneys' fees rates in these cases now is no more difficult or cumbersome than for determining attorneys' fees rates in antitrust cases. Furthermore, the available data suggests that, in general, fee awards have been modest. Granted, there are examples of egregiously high attorneys' fees being awarded under fee-shifting statutes. But the proper remedy for these rare cases is for the reviewing court to disallow fees which do not comport with current standards. This broad legislation is not warranted and would work great injustice, as an analysis of its specific provisions makes clear.

Realistically speaking, the result of the proposal would be to deny citizens wronged by their Government access to the courts. If enacted, a citizen who prevails against the Government would no longer have an opportunity to receive anything resembling reasonable reimbursement of his or her legal expenses. As a consequence, few citizens would be able to bring actions to resolve the important public interest issues under these many Federal statutes. Not only would the legislation place an arbitrary ceiling on hourly rates but, through numerous other fee limitations in the proposal, it would reduce the effective rate far below the $75 per hour figure.

No doubt the worst fee limitation provision in the proposal from the perspective of a prevailing plaintiff would be the provision stating that any monetary judgment awarded to the plaintiff shall be reduced by the amount of the fee awarded, up to 25 percent of the judgment. The effect of this provision is to require the prevailing party to pay his or her own legal fees, with the Government paying only any amount that may exceed 25 percent of the judgment. Thus, a party who has been wronged does not get full redress.

Another limitation on fees that would hit especially hard would be the requirement that fees and expenses could only be reimbursed to the extent that they resulted from work performed in connection with the issues upon which the party prevailed and that such work was necessary to resolve the controversy. An attorney cannot know before a trial what will be needed to convince a hearing officer or judge on each and every claim. A plaintiff deserves to have as complete an argument as possible made on his or her behalf. This provision may deny him or her the opportunity to be reimbursed for the legal expenses necessary to make such a complete argument and would have a severe chilling effect on the bringing of claims.

The legislation's proposed $75 per hour cap, especially given the other fee limitations in the proposal, is unjustified. This amount is not a fully compensatory rate or a reasonable rate for an experienced attorney handling complex civil litigation of the kind involved in the more than 100 statutes allowing the award of attorneys' fees in Federal litigation, ranging from antitrust to environmental to securities and civil rights litigation. Putting a $75 per hour cap on such awards would discourage experienced, competent attorneys from handling such cases. A comment by the Department of Justice in an earlier submission to the Senate, that allowing twice the hourly salary for Government lawyers should cover normal overhead expenses and provide for a reasonable allowance in most cases, shows a fundamental ignorance of the economics of private practice of law. Furthermore, DOJ comparisons of fee awards to hourly rates of Government lawyers neglect both the fact that Government lawyers get their salaries whether they win or lose, and the reality that Government lawyers receive a vast amount of clerical, investigatory and other support services which are not reflected in these allegedly comparative statistics. In addition, Government attorneys get substantial paid fringe benefits, such as vacation, sick leave and retirement. Such is not the case for attorneys taking on these fee-shifting cases. In addition, governmental entities have vastly greater resources available to them to provide support than does a private attorney.

Moreover, any arbitrary fees amount set by statute works an injustice. The experience under the recently amended Criminal Justice Act has proved that setting caps on awards of attorneys' fees results in undercompensation of attorneys. The CJA caps were in existence from 1970 until 1984. During that time the cost of living rose 160 percent yet attorneys working under that statute were limited to $30 per hour for time in court and $20 per hour for out-of-court time. Even if those hourly rates were adequate when the statute was enacted, they certainly became inadequate soon thereafter and were woefully inadequate by the time the statute was finally changed. The same is likely to happen to any cap in civil fee-shifting statutes.

The underlying rationale for fee-shifting statutes that have been enacted to protect the public interest is to "ensure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights * * *" H. Rept. 94-1558, 94th Congress, 2d session. 9 (1976). As has been succinctly stated in the Senate report on the same legislation:

> Civil Rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain. In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. (S. Rept. 94-1011, 94th Congress, 2 (1976)).

It is clear that arbitrarily limiting fee awards would serve as a potential obstacle to obtaining competent counsel. In effect what this legislation does is make it cheaper for a governmental entity to violate the law since attorneys' fees are awarded only when the governmental entity has been found to have violated the law or has agreed to a settlement which in effect makes the claimant a prevailing party.

In addition to the negative effect of imposing arbitrary fees, other provisions of this legislation which limit the award of attorneys' fees will deter competent attorneys from taking the cases. Such provisions include those that would eliminate the use of upward adjustments or multipliers and those which require a plaintiff to prevail on significant issues and obtain significant relief as a prerequisite to recovery of any attorneys fees.

Some proponents of this legislation may hope it will cut down on frivolous suits brought against governments. There is no evidence to support this conclusion. The suits brought now are not frivolous—attorneys who must prevail to collect their fees would not take frivolous cases. The real effect of this bill is only to reduce the quality of counsel and to frustrate the ideal of equal justice under the law.

Thank you for this opportunity to appear before you today and present the views of the American Bar Association.

[Prepared statement follows:]

PREPARED STATEMENT OF GARY D. SLAIMAN

Mr. Chairman and Members of the Subcommittee,

I am Gary Slaiman, a lawyer in private practice and a Council Member of the General Practice Section of the American Bar Association. I am also chairman of the General Practice Section's Federal Legislation Committee and the Young Lawyers Division's Legislative Action Committee. I am here at the request of the President of the American Bar Association, William W. Falsgraf, to express to you the Association's opposition to S.1580, the proposed Legal Fees Equity Act.

In July, 1985, the House of Delegates of the American Bar Association adopted the following resolution:

> Resolved, that the American Bar Association opposes the proposed Legal Fees Equity Act, (S.2802, H.R. 5757, 98th Congress), or similar legislation which would impose arbitrary and unreasonable limits on hourly fees for private attorneys that may be recovered from federal, state, and local governments under fee shifting statutes.

The Association has always been concerned that citizens with important public policy concerns be able to obtain resolution of these concerns through appropriate channels. Towards this end, the private bar has made and continues to make substantial pro bono contributions of legal services to meet the needs of many individuals and groups who would otherwise not be able to obtain access to the justice system. However, it is impractical to think that such voluntary efforts can or should provide the entire manpower to address important constitutional rights and public policy concerns. Congress has recognized in the enactment of scores of fee shifting statutes that the public good will be served only by providing some reasonable level of reimbursement for those who undertake representation in civil rights, environmental, and other such cases. A public responsibility requires a public commitment. S.1580 would effectively take away the government commitment to ensuring that public interest cases will receive appropriate consideration in the courts.

The bill would alter the current fees structure by: (1) limiting the hourly rate compensation to a maximum of $75 per hour; (2) eliminating any possibility of upward adjustments or multipliers; (3) limiting the recovery to less than $75 per hour where that rate unreasonably exceeds the hourly salary of the attorney representing the party (an adoption of a cost-based approach)[1]; (4) requiring the plaintiff who recovers a money judgment against a governmental agency to generally apply 25% of the money judgment towards attorneys' fees; (5) providing that fees may be reduced if the award would unreasonably exceed the monetary result or injunctive relief achieved or if the prevailing party has engaged in conduct that unreasonably protracted the final resolution of the controversy; and (6) altering the test for the award of attorneys' fees articulated in *Hensley* v. *Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), by requiring prevailing parties to have succeeded on *significant issues* in the litigation *in terms of the result sought*. (The test in *Hensley* was more broadly defined to include achieving some of the benefits sought by the parties.)

Further, the proposed statute would deny awards of attorneys' fees for services performed after the written offer of settlement if the party rejects the offer and does no better when the case is resolved on the merits.

According to the Justice Department, the purpose of the bill is to

> have Congress provide greater guidance to the courts and federal agencies for the award of attorneys' fees pursuant to federal statute, and to reduce the current uncertainties and disparities reflected in the present decisions.

This rationale for the legislation is undercut in large measure by recent Supreme Court decisions applying fee shifting statutes in accordance with the direction of Congress. The ABA has recommended, and courts have applied all or most of, the following list of relevant factors in setting fees awards:

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[1] Contrary to the recent Supreme Court decision in *Blum* v. *Stenson*, 465 U.S. 866, 52 L.W. 4377 (1984) which rejected such an approach.

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the lawyer or lawyers performing the services.
8. Whether the fee is fixed or contingent.

ABA Code of Professional Responsibility, Canon 2, DR-2-106(B)(1969).

Moreover the Supreme Court has recently clarified the standards for awarding attorneys' fees in civil fee shifting statutes. Blum v. Stenson, supra., Hensley v. Eckerhart, supra. These decisions make it clear that, whether the prevailing party is represented by private practitioners or a non-profit legal organization, reasonable attorneys' fees are to be calculated based upon the prevailing market rate in the relevant community and that upward adjustments of such rates are only appropriate "in some cases of exceptional success."

In so doing, the Supreme Court emphasized in the *Blum* case that it was following the direction of Congress (52 L.W. at 4379):

> The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, authorizes district courts to award a reasonable attorney's fee to prevailing civil rights litigants.[2] In enacting the statute, Congress directed that attorney's fees be calculated according to standards currently in use under other fee-shifting statutes:
>
> > It is intended that the amount of fees awarded under [§1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases [,] and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis* v. *County of Los Angeles*, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. S. Rept. No. 94-1011, p. 6 (1976).[3]
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> In all four of the cases cited by the Senate Report, fee awards were calculated according to prevailing market rates.[4] None of these four cases made any mention of a cost-based

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[2] Section 1988 provides in relevant part: 'In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.'

[3] According to H. Rep. No. 94-1558, p. 8 (1976).

[4] See *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, at 718 ('The customary fee for similar work in the community should be considered.'); *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, at 682 ('[In making the fee award,] the court will consider . . . the value of the [attorney's] time in light of billing rates. . .'); *Davis* v. *County of Los Angeles*, 8 Empl. Prac. Dec. 5044, at 5048 (fee award calculated by multiplying number of hours expended times the 'normal hourly rates' for attorneys of like skill and experience); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483, at 486 (fee award calculated with reference to hourly rates generally charged in federal litigation).

> standard.[5] Petitioner's argument that the use of market rates violates congressional intent, therefore, is flatly contradicted by the legislative history of §1988.

Contrary to DOJ's claims, the case law regarding the basis for awarding attorneys' fees is neither confusing nor unclear; the standards for defining a prevailing party for the purpose of securing attorneys' fees has been fully articulated; and the standard for determining attorneys' fees rates in these cases now is no more difficult or cumbersome than for determining attorneys' fees rates in antitrust cases. Futhermore, the available data suggests that, in general, fee awards have been modest. Granted, there are examples of egregiously high attorneys' fees being awarded under fee shifting statutes. But the proper remedy for these rare cases is for the reviewing court to disallow fees which do not comport with current standards. This broad legislation is not warranted and would work great injustice, as an analysis of its specific provisions makes clear.

Realistically speaking, the result of the proposal would be to deny citizens wronged by their government access to the courts. If enacted, a citizen who prevails against the government would no longer have an opportunity to receive anything resembling reasonable reimbursement of his or her legal expenses. As a consequence, few citizens would be able to bring actions to resolve the important public interest issues under these many federal statutes. Not only would the legislation place an arbitrary ceiling on hourly rates but, through numerous other fee limitations in the proposal, it would reduce the effective rate far below the $75/hour figure.

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[5] Congress was legislating in light of experience when it enacted the 1976 fee statute. By that time, courts were familiar with calculating fee awards for civil litigation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k), and under the judicially established 'private attorney general' theory that had prevailed prior to this Court's decision in *Alyeska Pipeline Serv. Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). None of the cases decided at that time had adopted a cost-based approach to calculating fees. Reference to market rate was uniform. See. e.g., *Waters* v. *Wisconsin Steel Works*, 502 F. 2d 1309, 1322 (CA7 1974), *cert. denied*, 425 U.S. 997 (1976); *Evans* v. *Sheraton Park Hotel*, 503 F. 2d 177, 187 (CADC 1974); *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, 517 F. 2d 1141, 1148 (CA4 1975); *Kerr* v. *Screen Extras Guild*, Inc., 526 F. 2d 67, 69-70 (CA9 1975), *cert. denied, sub nom. Perkins* v. *S. E. G., Inc.*, 425 U.S. 951 (1976).

No doubt the worst fee limitation provision in the proposal from the perspective of a prevailing plaintiff would be the provision stating that any monetary judgment awarded to the plaintiff shall be reduced by the amount of the fee awarded, up to 25% of the judgment. The effect of this provision is to require the prevailing party to pay his or her own legal fees, with the government paying only any amount that may exceed 25% of the judgment. Thus a party who has been wronged does not get full redress.

Another limitation on fees that would hit especially hard would be the requirement that fees and expenses could only be reimbursed to the extent that they resulted from work performed in connection with the issues upon which the party prevailed and that such work was necessary to resolve the controversy. An attorney cannot know before a trial what will be needed to convince a hearing officer or judge on each and every claim. A plaintiff deserves to have as complete an argument as possible made on his or her behalf. This provision may deny him or her the opportunity to be reimbursed for the legal expenses necessary to make such a complete argument and would have a severe chilling effect on the bringing of claims.

The legislation's proposed $75 per hour cap, especially given the other fee limitations in the proposal, is unjustifed. This amount is not a fully compensatory rate or a reasonable rate for an experienced attorney handling complex civil litigation of the kind involved in the more than 100 statutes allowing the awrrd of attorneys' fees in federal litigation, ranging from antitrust to environmental to securities and civil rights litigation. Putting a $75 an hour cap on such awards would discourage experienced, competent attorneys from handling such cases. A comment by the Department of Justice in an earlier submission to the Senate, that allowing twice the hourly salary for government lawyers should cover normal overhead expenses and provide for a reasonable allowance in most cases, shows a fundamental ignorance of the economics of private practice of law. Furthermore, DOJ comparisons of fee awards to hourly rates of government lawyers neglect both the fact that government lawyers get their salaries whether they win or lose, and the reality that government lawyers receive a vast amount of clerical, investigatory and other support services which are not reflected in these allegedly comparative statistics. In addition, government attorneys get substantial paid fringe benefits, such as vacation, sick leave and retirement. Such is not the case for attorneys taking on these fee shifting cases. In addition, governmental entities have vastly greater resources available to them to provide support than does a private attorney.

Moreover, any arbitrary fees amount set by statute works an injustice. The experience under the recently amended Criminal Justice Act (CJA) has proved that setting caps on awards of attorneys' fees results in undercompensation of attorneys. The CJA caps were in existence from 1970 until 1984. During that time the cost of living rose 160% yet attorneys working under that statute were limited to $30 per hour for time in court and $20 per hour for out-of-court time. Even if those hourly rates were adequate when the statute was enacted, they certainly became inadequate soon thereafter and were woefully inadequate by the time the statute was finally changed. The same is likely to happen to any cap in civil fee shifting statutes.

The underlying rationale for fee-shifting statutes that have been enacted to protect the public interest is to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights . . . ." H. Rep. No 94-1558, 94th Cong., 2d Sess. 9 (1976). As has been succinctly stated in the Senate Report on the same legislation:

> Civil Rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, 94th Cong., 2 (1976).

It is clear that arbitrarily limiting fee awards would serve as a potential obstacle to obtaining competent counsel. In effect what this legislation does is make it cheaper for a governmental entity to violate the law since attorneys' fees are awarded only when the governmental entity has been found to have violated the law or has agreed to a settlement which in effect makes the claimant a prevailing party.

In addition to the negative effect of imposing arbitrary fees, other provisions of this legislation which limit the award of attorneys' fees will deter competent attorneys from taking the cases. Such provisions include those that would eliminate the use of upward adjustments or multipliers and those which require a plaintiff to prevail on "significant issues" and obtain "significant relief" as a prerequisite to recovery of any attorneys fees.

Some proponents of this legislation may hope it will cut down on frivolous suits brought against governments. There is no evidence to support this conclusion. The suits brought now are not frivolous - attorneys who must prevail to collect their fees would not take frivolous cases. The real effect of this bill is only to reduce the quality of counsel and to frustrate the ideal of equal justice under the law.

Thank you for this opportunity to appear before you today and present the views of the American Bar Association.

Senator **HATCH**. Mr. Slaiman, let me bring a couple of issues to your attention for consideration.

Recently, Justice Brennan and three of his colleagues expressed their despair over the lack of standards with regard to fee-shifting. He stated that fee litigation is like Frankenstein's monster, it leaves waste and confusion in its wake. It is important to think about that. Although fee-shifting is less than 10 years old, we already have a three-volume treatise on fee shifting. Professor Berger has said that "the only consistent thread running through awarding of attorneys' fees is their almost complete inconsistency." The Supreme Court has expressed in one narrow decision over another frustration with circuit courts, and the unfair splits.

Now, what I would like you to do is reconsider the ABA position. I do not have any desire to dictate in this area. However, I want to do what is right. I am a member of the ABA. I would also like to resolve these problems on attorneys' fees.

In these cases, we are going to permit the fees to be about $75 an hour, while some of the most important cases involving civil rights in our country are cases brought under the Criminal Justice Act which gives fees much less than under these fee-shifting statutes.

Rather than having the ABA contemplate what we are trying to do outright. I would like to see if there is some ground where we can reconcile these conflicting policies. I think the whole country is getting into an uproar over these attorneys' fees. I will now leave the record open to you, Mr. Slaiman, for additional suggestions and answers to anything that has been stated earlier, either orally or in the written statement.

Mr. Fajardo, I can only give you 5 minutes.

STATEMENT OF RICHARD P. FAJARDO

Mr. **FAJARDO**. Let me make a couple of comments. There are four reasons for objecting to this legislation.

First, the bill frustrates the purpose of the Federal fee-shifting statutes by making it harder for private individuals, especially the indigent, to vindicate their civil and constitutional rights.

Second, the bill deters private attorneys from accepting civil rights and public interest cases by reducing their ability to collect awards and reducing the size of these awards. This will place a greater burden on the already taxed resources of public interest law firms such as MALDEF. The fact of the matter is that the private attorneys are the persons who take civil rights and other public interest cases, because other public organizations do not have the resources to do so. Private attorneys do not do it for money.

First of all, they have to shell out money to cover costs, and invest much of their time, but are not compensated until the end of the whole trial.

Senator **Hatch**. And may not be at all.

Mr. **Fajardo**. Yes. They may not be compensated at all, and it may be 2, 3, 4 years down the line before they see any money at all. As a consequence, if they are looking at $75 an hour instead of $100 or $100 plus, they are going to be more reluctant to take those cases if they may not be compensated.

Senator **Hatch**. That is a good point.

Mr. **Fajardo**. Another thing, too, it is hard to attract large firms to take civil rights claims. I will give you an example. This example is not in my testimony. An attorney from Arizona is involved in a major civil rights litigation, which is in Miracle Valley. Miracle Valley Church is a church of black citizens who came from the Chicago area to settle in Cochise County, AZ. Cochise County is predominantly white, and there was a lot of resistance to the church settlement. As a consequence, there was a lot of disruption, police harassment, and ultimately a death of a black citizen in the area.

Counsel Armond Salese could not afford to take the case by himself. He just could not afford the resources for major litigation, but was able to induce a large Phoenix firm to be cocounsel in the case.

I talked to both lawyers. They said under this legislation both would be reluctant to take such a civil rights claim. In fact, Mr. Begman, who handles the case for the Phoenix firm, indicated that he probably would have dropped the civil rights claims——

Senator **Hatch**. Let me interrupt you, because I am concerned about this point. I personally believe that this is again an area where the bar association should step in. Large firms should be just as interested in pro bono cases as small firms. Seventy five dollars is a lot more than a pro bono case. They will be getting some sort of compensation. I think we have to encourage these large firms to get into these cases, even though they may not be paid their $250 an hour. I would appreciate your most thoughful advice on this matter since there is clearly a problem throughout the country, and, frankly, something must be done. Part of the problem stems from a failure to give these judges any guidelines. Some awards are off the wall; some are too cheap. Some of them are awful in both ways. I say that, but that is the way it is, and I think we must develop some standards that will ensure responsibility and awareness. I believe you would find many more competent people willing to help in an effective manner than at the present time with the enactment of such standards.

Mr. **Fajardo**. One of the things we are forgetting here is the fact that it is the Government agencies that are violating constitutional rights of individuals. Many times the problem of settlement or the lack thereof raised by some of the Governors is a problem for private civil rights attorneys and us, too, and more so, than for the Governors and attorneys general, because of constant low rates, governments do not want to settle. They want to protract litigation. And, they are going to find it easier to protract the litigation. I think that is a serious consideration that needs to be dealt with.

[Prepared statement follows:]

PREPARED STATEMENT OF RICHARD P. FAJARDO

Mr. Chairman, my name is Richard P. Fajardo, I am the Acting Associate Counsel for the Mexican American Legal Defense and Educational Fund. MALDEF is a national civil rights organization dedicated to protecting the civil and constitutional rights of Mexican Americans and other Hispanics. We presently have offices in Los Angeles, San Francisco, San Antonio, Chicago and here in Washington, D.C.

On behalf of MALDEF I wish to express our opposition to legal fees Equity Act, S. 1580. This law seeks to limit the amount of attorney's fees that may be awarded under federal fee shifting statutes to plaintiffs who prevail in civil suits against federal, state or local governmental entities.

We have four major reasons for objecting to this legislation. First, the bill frustrates the purpose of the federal fee shifting statutes by making it harder for private individuals, especially the indigent, to vindicate their civil and constitutional rights. Secondly, the bill deters private attorneys from accepting civil rights and "public interest" cases by reducing their ability to collect awards and reducing the size of these awards. This will place a greater burden on the already taxed resources of "public interest" law firms such as MALDEF. Third, the bill will encourage federal states and local governments to violate or continue to violate, the rights of its citizens and residents, and it will discourage such entities from correcting illegal practices when they are brought to its attention. Finally, the bill will stimulate more litigation to interpret of the attorney's fees statutes, rather than reduce such litigation.

1. S. 1580 Frustrates the Purpose of the Federal Fee Shifting Statutes.

It is important to note several points at the outset. Federal fee shifting statutes are not lawyer's relief laws. Congress designed these laws to give individuals, especially minorities and the poor, access to adequate legal counsel.

The Congress reaffirmed this purpose when it passed the Civil Rights Attorney's Fees Awards Act of 1976.[1] The Act was passed in responsed to the Supreme Court ruling in Alyeska Pipeline Services Company v. Wilderness Society,[2] where the court ruled as improper the practice in most lower courts to award successful plaintiffs attorney's fees in civil rights or public interest cases - improper, that is, in the absence of legislation authorizing such awards.[3] The Congress determined that:

> The purpose and effect of [the fees act] are simple - it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts . . . All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain.
> In many cases arising under such civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

Thus, Congress found that the direct enforcement of civil rights laws by the victims of civil rights practice was severely hampered by their inability to pay the substantial costs and fees attendant upon legal proceedings. In providing for attorney fee awards for meritorious cases Congress lessened, but did not eliminate, this obstacle to the vindication of rights.

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[1] The Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988, [hereinafter Sec. 1988].

[2] 421 U.S. 240 (1975).

[3] Id. at 427.

Congress in enacting Sec. 1988 "directed that attorney's fees be calculated according to standards currently in use under other fee-shifting statutes," Blum v. Stenson,[4] citing with approval several cases which Congress noted set and implemented the appropriate standards in other fee shifting statutes for setting fees.[5]

The need for attorney fee awards undiluted by the artificial factors setforth in S. 1580 is a compelling as ever. Minorities and the poor bear the brunt of discriminatory practices, but do not have the resources to pay the ever increasing costs of competent legal representation.

MALDEF is intimately familiar with the plight of Mexican American and other Hispanics in this country. Daily we encounter Hispanics at the lower end of the economic spectrum who are the victims of pervasive discriminatory practices perpetrated by public officials as well as private parties. Where do persons who can't afford legal counsel go where their civil and constitutional rights are violated? They call on public interest organizations such as MALDEF and other public interest law firms. However, we cannot begin to provide but a fraction of the services needed by our community.

In fact, many private attorneys take many of these cases. The provisions of S. 1580 will discourage private attorney from taking these cases. As a result the indigent will have no place to turn for legal counsel to vindicate their rights. Yet, while Hispanics Americans are in dire need of representation, poverty prevents access to private legal counsel to correct abuses.

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[4] 104 S.Ct. 1541 (1984).

[5] S. Rept. No. 94-1011, 94th Cong., 2d Sess., 1 (1976), citing with approval Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974); Stanford Daily v. Zurchen, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. §9444 (C.D. Cal. 1974); and Swann v. Charlotte - Mechlenburg Board of Education, 66 F.R.D. 483 (W.D. N.C. 1975).

Nor can Hispanic rely on federal agencies for protection. In many instances, the federal government is the violator of a federal right. Moreover, civil rights enforcement is subject to political consideration in all administrations. One need only look to the present administration enforcement of civil rights laws. At best, the administration has serious policy differences on how the civil rights laws should be enforced, at worse, it is openly hostile to enforcement of many civil rights laws. Even where the government chooses to act conscientiously, backlogs, budget cuts and bureaucratic inefficiencies seriously limit even the best intentions.

It is also important to note that attorney's fees awards are made when a party has prevailed. A plaintiff in a civil rights claim has this shown his/her civil or constitutional rights have been violated by the defendant. Where a Federal, state or local government is involved, the plaintiff will have demonstrated the governmental federal law, i.e. the governmental entity is a wrong doer. Thus, in analyzing the impact of S. 1580 it is important to keep in mind that the government is not an innocent party, but has violated the laws. Thus, where a bill seeks to shift burden as between two parties, it is inappropriate to ease the burden of the wrongdoer, by reducing the amount of attorney fees they will pay at the expense of the attorney who has risked much to vindicate the rights of the aggressive party.

2. S. 1580 Will Deter Private Attorneys From Accepting "Public Interest" Cases Against Governmental Entities

The bill will deter the private attorney from litigating cases to vindicate civil and constitutional rights under federal law as against federal, state and local governmental entities. The reason is that S. 1580 would limit or reduce the award of attorney's fees, hence lawyers will be reluctant to pursue such cases. This will especially impact small law firms or sole practitioners.

S. 1580 proposes to limit the rate for attorney compensation in civil, judicial and administrative proceedings under all federal fee shifting statutes to 75 dollars. Compensation would be limited to reimburse legal services provided by licensed attorney only. Moreover, the bill allows reductions in the amount of fee awarded where (1) litigation is "unreasonably protracted," (2) the fee "unreasonably" exceeds the salary of the attorney, and (3) where the time spent and legal services provided are excessive with regard to the nature of the controversy. The bill would also allow reductions where the fee "unreasonably" exceeds the monetary result or value of the injunctive relief.

While the bill would allow an award of attorneys fees to be reduced under the circumstances enumerated above, at no time would a judge be granted the discretion to increase an award. Bonuses and multiples are expressly prohibited, and factor such a dilatory tactics by defendants or complexity of the proceedings may not be considered in the computates of the court.

The $75 limitation as attorney fee awards is below the prevailing market rate in many areas. For example, in Chicago a private attorney, Mr. Thomas Johnson, with 10 years of prior legal aid foundation experiences can get $100 per hour. The MALDEF regional office Director, who has seven years legal experience, regularly requests and receives $100 per hour without objection by opposing counsel. In Texas attorneys just out of law school can be awarded $75 per hour limit is well below the prevailing market rate.

About a third of Mr. Johnson's practice is "civil rights" work. Many cases are litigated against state and local entities challenging the exclusion of persons for various benefits and entitlement, the shut down of care to the ill, disabled and elderly and has challenge election relative practices. To limit Mr. Johnson to $75 an hour in legal fees is to cut his income in such cases by 25 percent. [His total income would be cut by eight to 10 percent]. What is more important, the governmental entities which violated the rights of Mr. Johnson's clients are able to profit from this legislation inspite of the fact that they are the wrongdoers.

Moreover, small offices such as Mr. Johnson's can not absorb the costs and overhead as readily as governmental offices or large private law firms. In addition, in many instances practitioners are collecting fees for work done many years before the award was made. As fee are reduced and limited private attorneys will not take cases which will not reimburse their costs and efforts after waiting so many years.

In fact, many lawyers are beginning to reduce the number of public interest cases, they accept precisely because fees are already being reduced. Many judges disallow hours spent on case or reduce the "reasonable rate." In Texas, one practitioner indicated his civil rights case load makes up about five percent of his total work load, down from a substantially higher percentage (ranging from 30 - 50 percent).

In spite of the fact that private attorneys will be limited in their fee awards, state and local governments will be free to hire high priced counsel. In Chicago, Mr. Johnson indicated that in his case to challenge Illinois efforts to reduce several assistance to the indigent, the Illinois Department of Public Aid hired the firm of Hopkins & Sutter, a firm with close to 100 lawyers, the fees paid to this counsel were in all likelihood over $100 per hour.

In Texas, MALDEF has challenged many of the election practice of the state and local governments. Many of the governmental entities hire outside private counsel who has expertise which they lack.

As, the ability to recover attorney's fees is reduced, private attorney will not represent cases to vindicate or challenge governmental practice that violates the constitution and other federal laws. This will cause minorities and the poor to seek additional help from "public interest" organizations such as MALDEF.

The impact fee limitation is further aggravated for public interest firms by the provisions that fee awards can be reduced if the award "unreasonable exceeds the hourly salary of the attorney" representing the prevailing party. This overrules existing laws. In Blum v. Stenson, supra, the court unanimously held that fees are to be determined by the prevailing rate, irrespective of the fact that firm is non-profit or "public interest." The court noted the legislation history of Sec. 1988 clearly indicated the prevailing market rates to be granted to non-profit as well as private firms.[6]

The reasons are simply and straightforward. First, applying the market rates rewards and encourages public interest firms to devote their limited resources to enforce civil rights and public interests statutes. Secondly, to reduce the award below the prevailing rates will provide a windfall to governmental entities. Given the fact that the governmental entity is a wrongdoer, they should not be allowed to profit from their Acts. Finally, the governmental entities will have every incentive to protract the litigation, continue their illegal practices and refuse to negotiate a settlement. Laws which encourage dilatory tactics are counter productive to the judicial system.

CONCLUSION

Therefore, for the reasons stated in our testimony, above, we encourage this Subcommittee to oppose S. 1580, the Legal Fees Equity ACt.

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[6] See S. Rept. No. 94-1011, supra at 6.

Senator HATCH. I would like to personally thank both of you; your testimony is crucial to this hearing. Please scrutinize the statements of the other excellent witnesses as well and assist us in arriving at some standards. A judge cannot be left with this responsibility since he may give no award or less than an adequate award. Other awards may be off the wall. For instance, we have one here for $425,000 in attorneys' fees and 100 percent add-on for additional attorneys' fees, making a total of $850,000. The $425,000 would have been more than adequate. You are both intelligent, articulate spokesmen. We would appreciate your advice and assistance. I would like to resolve this problem in a fair manner, satisfactory to all involved parties. The present system is a shambles. And I believe many of the problems are caused by judges who have no guidelines or standards. We must give them standards that they can abide by.

Please offer the best solutions possible. On that final note, I must recess until further notice.

Thank you. We will now recess.

[Whereupon, at 12 p.m., the subcommittee adjourned, subject to the call of the Chair.]

LEGAL FEES EQUITY ACT

TUESDAY, OCTOBER 29, 1985

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:46 a.m., in room SD-538, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond and Grassley.

Staff present: Randall R. Rader, chief counsel and staff director; Robert E. Feidler, minority chief counsel; Sharon J. Faxon, chief clerk; and Nathalie W. Blackwell, clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator Hatch. I apologize for being late, but I have been talking to OMB and a whole bunch of other people this morning on some very important issues of legislation that's right on the burner. It is just the life of a U.S. Senator, I guess.

We welcome all of our witnesses and those who are in attendance today. If we count the hearing on this legislation held last Congress, this is the third day of hearings on the Legal Fees Equity Act.

The Legal Fees Equity Act is a bill introduced by Senator Thurmond and I at the request of the Justice Department to provide uniform standards for setting attorney fee awards.

Now, I'm going to put the rest of my remarks into the record at this point.

[Statement follows:]

Prepared Statement of Senator Orrin G. Hatch

Congress has enacted some 131 statutes permitting the award of attorney fees in litigation before courts or administrative agencies. Congress worthy intent in enacting these statutes is to ensure the availability of competent legal representation to enforce the legitimate rights of individuals who might not otherwise be able to afford counsel. This admirable goal remains central to these congressional deliberations, but the Senate should also seek means to achieve that goal more efficiently and without the windfalls and dislocations caused by the current lack of clear policy.

The operative language of many fee-shifting statutes consists of a mere twenty-four words: ". . . The court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. 1988 (1976). This sparse guidance to courts for the award of fees has caused confusion over the proper rules fee awards, a misapplication of judicial resources to determine proper awards, and, in some cases, inordinately high fee awards. As a result of incomplete legislative guidance, standards have varied widely from court to court and State to State. Some courts have even employed multipliers, or bonuses, to double or triple a fee which already fully compensated an attorney for his time and expertise.

A recent Supreme Court opinion written by Justine Brennan adequately characterizes the circumstances calling for this legislation by noting that litigation over fees "Serves no productive purpose, vindicates no one's civil rights, and exacerbates the myriad problems of crowded appellate dockets." *Hensley* v. *Eckerhardt,* 103, S. Crt. 1933 (1983). Justice Brennan also stated that fee litigation is becoming "a vast body of artifical judge-made doctrine, with its own arcane procedures, which, like Frankenstein's monster, meanders its well-intentioned way through the legal landscape, leaving waste and confusion (not to mention circuit splits) in its wake." Id. This account of the confusion and consumption of scarce judicial resources is supported by the realization that the West Publishing Company's case annotations accompanying just one of these statutes has grown in less than nine years to occupy 179 pages of fine print. In 1980 alone, one circuit (the fifth) issued over 50 written opinions on attorney fee shifting. In that same year, the Supreme Court itself issued nine opinions on fee shifting and has issued more opinions in each term since then.

The evident frustration of the Supreme Court is shared by other commentators. For instance, the Washington Post editorialized that some fee shifting cases "reaveal elements of a gigantic ripoff . . . lawyers—even civil rights lawyers—need as much wage restraint as others when it comes to billing the government."

In response to these plaintive cries for some standards to govern fee shifting, the Justice Department has development S. 1580. This legislation would provide guidelines for what constitutes a "reasonable fee." A key feature of the legislation would cap attorney fee claims at $75 per hour. Last week the deputy attorney general of the United States and two State Attorneys General appearing on behalf of the National Association of Attorneys General testified that this cap would be sufficient to attract competent counsel for meritorious cases in their states and nationwide.

With that as background, the subcommittee looks forward to the opportunity to examine further the issues connected with setting appropriate standards for attorney fee shifting.

Senator **HATCH**. Something has to be done in this area and Senator Thurmond and I are dedicated to doing it. We just have to resolve these problems.

I hope that the testimony today will be of assistance to us in how best to resolve these problems.

Senator Thurmond, we'll turn to you as full committee chairman.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

The **CHAIRMAN**. Thank you. Mr. Chairman, I have a very brief statement and then I have to preside at another meeting. I wish to thank you for calling on me at this time.

Mr. Chairman, it's a pleasure to be here today as the Subcommittee on the Constitution holds its second day of hearings on S. 1580, the proposed Legal Fees Equity Act. As I stated at the subcommittee's first hearing on this legislation, S. 1580 is intended to bring some greatly needed rationality and consistency to Government compensation of private attorneys.

I believe it is very important that the Congress act to solve the problems of increasingly exorbitant attorneys' fees and disparity among those fees, and the burdens to courts and litigants which result from expensive litigation of attorney fee issues.

It is my understanding that the subcommittee will also receive testimony today on S. 1794, a bill that I introduced at the request of the Judicial Conference, and S. 1795, introduced by Senator

Hatch with my cosponsorship. These bills would reverse that part of the 1984 Supreme Court ruling in the case of *Pulliam* v. *Allen*, which upheld the award of attorneys' fees against judges or judicial officers.

Mr. Chairman, I believe that the *Pulliam* case is going to have a chilling effect on judicial independence and judicial detachment throughout the country. I, therefore, believe it is appropriate that we include this issue in our reevaluation of the federally mandated attorney compensation schemes.

We have a distinguished group of witnesses with us today and I look forward to reading the testimony of those that I do not get to hear in person. I can stay about 7 or 8 minutes more and then I will have to leave.

Thank you very much, Mr. Chairman.

Senator HATCH. Thank you, Mr. Chairman. We are grateful for your presence whenever possible. We know how busy you are.

I want to just mention that yesterday, Chairman Thurmond and I introduced legislation addressing the problems created by the Supreme Court's *Pulliam* decision; and, of course, that decision does make judges liable for attorneys' fees. Our first panel is going to testify on that subject. We look forward to hearing their testimony.

[Text of S. 1794 and S. 1795 follow:]

II

99TH CONGRESS
1ST SESSION

S. 1794

To amend Revised Statutes section 722 (42 U.S.C. 1988) to exempt State judges and judicial officers from assessment of attorneys' fees in cases in which such judge or judicial officer would be immune from actions for damages arising out of the same act or omission about which complaint is made.

IN THE SENATE OF THE UNITED STATES

OCTOBER 28, 1985

Mr. THURMOND (for himself and Mr. HATCH) (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend Revised Statutes section 722 (42 U.S.C. 1988) to exempt State judges and judicial officers from assessment of attorneys' fees in cases in which such judge or judicial officer would be immune from actions for damages arising out of the same act or omission about which complaint is made.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the last sentence of section 722 of the Revised Statutes, as amended (42 U.S.C. 1988) is amended to read as follows: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs: *Provided*, That no such fees shall be awarded against a judge or judicial officer who would be immune from actions for damages arising out of the same act or omission about which complaint is made.".

II

99TH CONGRESS
1ST SESSION

S. 1795

To provide that in judicial actions against State judges, such judges shall not be held liable for attorney fees.

IN THE SENATE OF THE UNITED STATES

OCTOBER 28, 1985

Mr. HATCH (for himself and Mr. THURMOND) (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To provide that in judicial actions against State judges, such judges shall not be held liable for attorney fees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 722 of the Revised Statutes, known as the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. 1988) is amended by inserting before the period the following: "', except that no justice, judge, or judicial officer of a court of a State, shall be held liable for any costs, including attorney fees, in any proceeding brought against such justice, judge, or judicial officer for actions taken in an official capacity".

SEC. 2. Notwithstanding any other provision of law, no justice, judge, or judicial officer of a court of a State, shall be held liable for any costs, including attorney fees, in any proceeding brought against such justice, judge, or judicial officer for actions taken in an official capacity.

Senator HATCH. We are very honored to have Hon. Edwin Peterson, chief justice of the State of Oregon and the Honorable S. Hugh Dillin of the U.S. District Court for the Southern District of Indiana as our first two witnesses.

We certainly appreciate having both of you here. We welcome you and we look forward to hearing your testimony.

Now, we have asked all witnesses—it seems almost a pity to travel as far as you do and then be limited to 5 minutes—to limit your remarks to 5 minutes if you can so we may have more time to ask questions.

We will make this a blanket statement for the whole hearing. We will put all written statements into the record as though fully delivered, but we do appreciate summaries. Both of us are very pressured this morning. So we must, unfortuneately, place a little pressure on you as well.

Let's turn to you, Justice Peterson, and take your testimony at this time. Then we'll take yours, Judge Dillin.

STATEMENT OF A PANEL CONSISTING OF HON. EDWIN PETERSON, CHIEF JUSTICE, STATE OF OREGON; AND HON. S. HUGH DILLIN, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF INDIANA

Judge PETERSON. Mr. Chairman and Senator Thurmond, being a judge, I'm accustomed to imposed time limitations on others and I will accept your imposition of the time limitation as well.

Senator HATCH. Thank you, sir.

Judge PETERSON. I do appreciate the opportunity to present a brief summary of some concerns that I have. It is obvious from reading yesterday's Congressional Record and from reading the introductory remarks that you had entered, Senator Hatch, that you and Senator Thurmond understand the complexity of the problem and the fact that the *Pulliam* decision does threaten the independence of the judiciary.

As you mentioned, I have already prepared and filed a formal statement, but I would like to supplement it by a few brief remarks.

Following the *Pulliam* decision in 1984, virtually every judge in the United States became concerned about the threat that the imposition of attorney fees poses to sitting judges; and virtually every judicial organization, from the Conference of Chief Justices, the Judicial Conference of the United States, and the American Bar Association passed resolutions recommending that legislation be passed to amend the last sentence of 42 U.S.C. 1988 so as to immunize judges from the imposition of attorney fees under the Civil Rights Act.

Now, as you know, judges, like legislators, are sworn to and take an oath to uphold the law. If the Congress passes a law, the judge must apply that law as the Congress has passed it unless the judge believe that the law is unconstitutional or otherwise invalid.

I would like to give you a brief example of how the *Pulliam* decision has affected me as Oregon's chief judge and administration head of the Oregon courts.

Immediately upon my becoming chief justice I became aware of the fact that I was a defendant in a lawsuit filed in Oregon to enjoin me from enforcing a statute that concerned the collection of attorney fees from indigent defendants. As you know, the law requires that the State provide attorneys for indigent defendants.

This law also provided that attorney fees so provided by the State for indigents could be collected from an indigent if it later developed that the indigent had funds to pay. An indigent who had been found not guilty by a jury brought a suit in the Federal court claiming that this statute was unconstitutional and that I and all of the other judges in Oregon should be enjoined from enforcing the statute.

The Federal judge in Oregon held for the plaintiff, that the statute was unconstitutional, enjoined me from enforcing the statute, and imposed attorney fees against me of $35,000.

I don't quarrel with the correctness of the Federal judge's decision insofar as the merits of the case are concerned, but I would point out that once that decision had been made and once the attorney fees had been imposed upon me, that substantially fettered me in the discharge of my duties as the chief administrative officer of the court. For example, I had to decide how that decision had related effects in other areas not directly covered by that lawsuit.

The result was that, notwithstanding what the statute said, if there was any ambiguity instead of forthrightly discharging my responsibility as a judge I resolved all ambiguities in favor of the defendants.

Now, we can't have a judiciary that is so fettered in the exercise of the independent judgment of the judge. It's exactly the same situation, I respectfully submit, as if you were called upon to vote upon a measure that came before you and the suggestion was made that it might be unconstitutional. If you were to be held liable for attorney fees, if it later turned out that the bill that you voted for was declared unconstitutional, that would fetter your independent judgment as well.

One California judge—and I would just like to briefly quote him—wrote that although he had not been sued he has—

> * * * declined to issue warrants for the arrest of certain people who failed to respond to subpoenas and orders to appear in court in the quite reasonable fear that a technical defect in the pleadings or service might result in his personal liability.

Most of the cases in which attorney fees have been imposed against judges involved situations in which the judge was following the law as the legislature passed it. I have no quarrel with the rule that says judges should be liable for acting outside of their jurisdiction, both for damages or injunctive relief, but that's not what we're talking about in these two measures that you two Senators proposed yesterday.

As Justice Powell pointed out in dissenting in *Pulliam*, "The *Pulliam* decision hits at the very foundation of judicial independence." Between 1982 and 1985, the number of section 1983 claims against judges has tripled.

The *Pulliam* majority concluded its opinion by inviting Congress to look into this. The majority said, "It is for Congress, not this

Court, to determine whether and to what extent to abrogate the judiciary's common law immunity."

Of course, you have to consider this: Will the passage of S. 1794 and S. 1795 to immunize judges undercut the civil rights law generally? I suggest that it will not.

I am not aware of any substantial opposition to immunizing judges from the imposition of attorney fees, and I respectfully suggest and hope that this Congress will see fit to restore the common law immunity that judges historically have enjoyed and which is so important to judicial independence.

Thank you very much.

Senator HATCH. Thank you. I agree with you.

[Statement follows:]

PREPARED STATEMENT OF EDWIN PETERSON

Mr. Chairman and Members of the Subcommittee. The Conference of Chief Justices appreciates this opportunity to express its support for legislation that would restore and protect the doctrine of judicial immunity. I am Edwin J. Peterson, Chief Justice of the Supreme Court of Oregon and chairman of the Conference's Committee on Judicial Immunity/Pulliam v. Allen. I have been asked to appear by the President of the Conference, Chief Justice Edward F. Hennessey of the Supreme Judicial Court of Massachusetts.

We are greatly in you debt, Mr. Chairman, for the forum this hearing provides for discussion of the critical problems posed for the immunity doctrine by attorney fee awards against judges.

At the threshold, it is important to separate what we seek from what we do not seek. Under 42 U.S.C. 1983, state judges now can be enjoined from acts that impinge on the constitutional rights of citizens. Under 42 U.S.C. 1988, attorney fees now can be recovered from judges incident to the entry of injunctive relief. We seek no amendment, restriction, or modification of anyone's rights under Section 1983. We do seek judicial immunity from the award of attorney fees under Section 1988.

As you may recall, we first informed the subcommittee of our concerns about this issue last September when we requested an opportunity to express our views on Pulliam v. Allen,[1] decided by a sharply divided (5-4) Supreme Court on May 14, 1984. At that time we said of the decision: "No development in recent times has aroused greater concern on the part of state judges". First, a brief summary of Pulliam.

Gladys Pulliam, a magistrate in Culpeper County, Virginia, had apparently set bail for Richmond Allen and Jessie Nicholson for certain offenses which were nonjailable under Virginia law. This resulted in both Allen and Nicholson being incarcerated for a period of time for failure to make bond, although they were charged with offenses for which the maximum penalty in Allen's case was a $500 fine and, in the case of Nicholson, a $100 fine. After their cases were disposed of, Allen and Nicholson became plaintiffs in action pursuant to 42 U.S.C. 1983 against Magistrate Pulliam. A judge of the District Court for the Eastern District of Virginia found that Margistrate Pulliam made it her practice to require bond for nonincarcerable offenses, found the practice to be unconstitutional on due process and equal protection grounds, and enjoined her from further actions of a similar nature. The Court further directed that "any pretrial dentention for persons arrested for Class 3 and Class 4 misdemeanors on the grounds that the person is lawfully deemed likely to be a danger to himself or to others may last only so long as such danger exists ...."

In addition to the injunctive relief, the District Court awarded $7,691.09 to the plaintiffs as costs including a counsel fee of $7,038. Magistrate Pulliam, claiming judicial immunity, appealed only from the award of counsel fees. The Court of Appeals for the Fourth Circuit determined that the magistrate was not immune from an award of counsel fees, nor was she immune from prospective injunctive relief. The Supreme Court affirmed, expressly holding that the venerable common law doctrine of absolute judicial immunity is not a bar to injunctive relief in federal civil rights (42 USC 1983)[2] actions against a member of the state judiciary acting in a judicial capacity, or to the award of attorney fees against the judge under 42 USC 1988[3].

Nothing has occurred in the year since Pulliam came down to lessen our concerns. On the contrary, preliminary data from surveys recently completed for us by the National Center for State Courts indicate that our fears were well founded and that state judges face increasing exposure to fee awards in cases challenging their judicial as well as other official decisions.

We are here today because we firmly believe, as did the four dissenting justices in Pulliam, that the decision seriously breaches the doctrine of absolute judicial immunity and therefore threatens the independence that is at the heart of the judicial function. State judges cannot act effectively if their decisions, even when reasonably and conscientiously made in keeping with state law, are subject to immediate challenge in the federal courts and the legal costs that involves. This central point was made by Justice Powell, speaking for the minority in Pulliam:

> "The Court affirms a $7,691 money judgment awarded against a state magistrate on the determination that she made erroneous judicial decisions with respect to bail and pretrial detentions. Such a judgment poses the same threat to independent judicial decisionmaking whether it be labeled 'damages' of $7,691 or 'attorney's fees' in that amount ... The burdens of having to defend such a suit are identical in character and degree, whether the suit be for damages or prospective relief. The holding of the Court today subordinates realities to labels. The rationale of the common-law immunity cases refutes the distinction (between fees and damages) drawn by the Court."[4]

The Court agreed that "there is, perhaps, some logic" to the argument that "the chilling effect of a damages award is no less chilling when the award is denominated attorneys's fees." But the majority went on to say "that it is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity."[5]

Whatever the merits of the legal arguments the court has ruled and told us that only Congress can mend this breach in the ancient doctrine of judicial immunity.

Before proceeding with a discussion of the remedy we now think necessary I should again note that we are not seeking change in 42 USC 1983. Therefore, we are not asking Congress to deal with the Pulliam court's finding that judicial immunity is not a bar to injunctive relief. We are addressing only that portion of the decision which held that Congress, by failing to grant a specific exemption for judges in the Civil Rights Attorney's Fees Awards Act of 1976 (amending 42 USC 1988), intended that judges be liable for fee awards and accoringly intended to limit their common law immunity to that extent.

You will recall that the Attorney's Fees Act was passed by Congress in response to the Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society[6]. In that decision the Court held that federal courts, which had been awarding fees to prevailing plaintiffs under their equity powers, could no longer do so absent specific authority from Congress. Because such statutory authority was lacking in the Reconstruction Civil Rights Acts, including 42 USC 1983, Congress moved quickly to fill the gap. A bill was signed into law on October 11, 1976, only 17 months after the opinion came down. The Senate Judiciary Committee, indeed, reported the bill without hearings, relying on earlier hearings on legal fees conducted by the Subcommittee on Representation of Citizen Interest in 1973.[7]

We might not be here today if this body, when processing the Attorney's Fees bill, had been made aware of the judicial interests at stake Unfortunately, state judiciaries were not represented in Washington at that time and did not review or take a position on the bill. We have not had an opportunity to fully review the legislative history but we have seen enough to convince us that there was little if any participation by state and local officials, executive, legislative, or judicial. Certainly there was not a serious discussion of the doctrines of absolute legislative and judicial immunity as distinct from the limited immunity doctrines applicable to officials of the executive branch. A full review of the legislative history also would show, we believe, that while Congress did not specifically exclude judges from the Act it did not show a specific intent to include them either. As best we can determine, the issue simply was not discussed. There is no specific comment in the Senate report; certainly no reference to any intent to limit judicial immunity or to create a new right to fees against judges. Instead, the report made it clear that:

> "This bill creates no startling new remedy — it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's (Alyeska) decision."[8]

The House report limited its comments to two sentences, citing a particular need for counsel fees where "immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy." A footnote to this comment cited three Supreme Court decisions discussing qualified immunities. Only one of these, Pierson v. Ray,[9] involved a judicial officer and he was held immune from damages in an opinon by Chief Justice Earl Warren that included powerful statements in support of the doctrine of absolute judicial immunity. Because legal fees against the judge were not at issue, and because the case also involved police officers who were found to have a qualified immunity, the House report, in context, should be read as citing a need for legal fees in cases against executive officials protected by limited "good faith" immunity. Therefore, we must conclude that Congress's failure to specify one intent or the other on judicial immunity was meant to ratify prevailing practice and this did not include fee awards against the judiciary in cases involving injunctive relief.

We have not been able to locate the Senate hearings[10] from 1973 but it appears from the House hearings,[11] held in October and December of 1975, that we are correct in concluding that the doctrine of judicial immunity was not at issue. Sponsors of the bill made it clear at all stages of the legislative process that the only intent was to restore the status quo ante by providing the statutory authority for fee awards required by Alyeska. The principal Senate sponsor of the legislation, John V. Tunney, said:

> "The purpose of this bill is simple -- it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes ... It therefore restores to the federal courts authority which they had exercised for years until a little over 2 months ago."[12]

Similarly, Robert W. Kastenmeier, chairman of the House subcommittee with original jurisdiction over the bill, said:

> "This is a first step and a rather limited and cautious one. It does not overturn law or practice, except the Alyeska case ..."[13]

He went on to say, in tacit recognition of the hasty manner in which the legislation was considered, that the issue of fee shifting "needs much further analysis than this session would allow." It is our hope, then, that this Congress will give the doctrine of judicial immunity the attention it deserves and amend 42 USC 1988 to restore it to its historic form and assure its preservation.

We do not intend to burden this hearing with an extended discusson of judicial immunity. The corpus of case law and scholarly literature on the subject is immense and we would be pleased to provide recent studies, including discussions of the *Pulliam* decision, for the hearing record.[14] We take it for granted that there is no serious disagreement with the proposition that judicial immunity is essential to the Anglo-American system of justice. The United States Supreme Court, including the Pulliam court, has never wavered in its support for the doctrine as it involves direct damages against a judge for judicial decisions made in the exercise of proper jurisdiction. This was true even where commission of a tort was alleged to be corrupt or malicious.[15] It was true, that is, until the Pulliam court, relying on 42 USC 1988 as amended in 1976, permitted a fee award which it agreed could have the same "chilling effect" as an award of damages.

That a "chill" has gone through the ranks of state judges is beyond dispute. The reaction to Pulliam was powerful and immediate, involving individual judges and judicial and bar organizations at the local, state, and national levels. The Conference of Chief Justices, acting at its first meeting after the decision came down, expressed its alarm by passing resolutions (1) calling on Congress to restore the judiciary's common law immunity by amendment of 42 U.S.C. 1988, (2) urging the Judicial Conference of the United States to study the issue and support corrective legislation, and (3) creating a Task Force of the Conference of Chief Justices to study and report back to the Conference on the extent of the problems raised by the decision.[16] We are particularly pleased that the Judicial Conference, the American Bar Association and its Section of Judicial Administration, as well as many state judicial councils and bar assocciations have joined in the call for a legislative response. This means that the top policymaking officials of those most directly involved, including the state and federal judiciaries and the legal profession, see a threat to judicial immunity that requires action by Congress.

As I have indicated, this threat is confirmed by studies conducted for the Conference of Chief Justices by the National Center for State Courts. The first of these shows that the treat is real and widespread and that it involves judges' personal liability even when sued for decisions made in their official capacities. The summary of the findings is brief and can be quoted in whole:

> "Approximately half of the respondent Chief Justices reported that their jurisdictions have neither statutory indemnification nor insurance coverage for judges involved in litigation concerning their official duties. Fifteen states reportedly have indemnifiction statutes;

another four appear to have some type of state indemnity practice. Only nine states provide statutory immunity to their judges. Fourteen respondents reported that their jurisdictions have insurance that pays for some or all of the expenses involved in the litigation of claims against judges.

"Although almost all of the states have representation provided by the Attorney General (or other public legal office), specific information on the types of coverage for damages and attorney's fees provided under insurance policies and indemnification statutes is not comprehensive and was unknown by many respondents.

"Legislative activity to remedy the situation is currently minimal. Although 46 respondents reported not having judicial immunity statutes, 72% responded that such legislation is not being sought. Similarly, in the 40 states without statutory indemnification, 60% are not seeking such protection.

"Slightly more activity is being directed toward the procurement of insurance. Forty-five percent of the respondents report current negotiations for state-provided judicial insurance. Forty-four percent report that individual judges are beginning to purchase their own insurance policies."[17]

It is clear from this summary that the states, long relying on the doctrine of judicial immunity as the only protection needed for their judges, are not prepared to meet the present threat and that many judges are being forced to seek a limited and doubtful form of protection through insurance policies purchased at their own expense. The salaries of state judges, I need not remind you, do not make them an affluent class capable of absorbing large economic losses or adequately insuring themselves against them. The study was published in January of this year from data gathered in the late summer and fall of 1984 and reflects the current situation.

The second study of interest was completed just last month and contains the best current data on the number of law suits being filed against state judges under 42 USC 1983. It covers the period from January 1982 to March 1985 and records a total of 957 cases. All but eight of the 48 states responding to the survey reported case filings against judges under the act. Noting the difficulty of collecting data on specific types of case filing, the report states that, "If there is a weakness in the data it is undoubtedly one of underrepresenting the volume of litigation — rather than overstating it."

In a key finding the study reports that:

> "...litigation under Section 1983 is increasing yearly. Between 1982 and 1983, the total number of reported filings increased from 177 to 264, or 49%. From 1983 to 1984, the filings increased 45%, from 264 to 382. Although it is too early to accurately measure the increase from 1984 to 1985, an estimate of 1985 filings can be derived by multiplying the figure for the first quarter by four. This rough estimate of a projected 536 cases also indicates a steady increase in case filings."

The bulk of these cases, the study found:

> "...are being brought by disgruntled litigants who view Section 1983 as a means of redress against judges who have ruled against their interests in previous lawsuits. It is clear from the case statistics that very few of the cases are decided (or settled) favorably to plaintiffs. Yet, in only a very few of these suits have attorney's fees and costs been awarded against the plaintiff for the 'frivolous' nature of the suit."

The study also reports that:

> "Despite the fact that many of these suits are brought pro se, or by litigants not represented by counsel, the yearly statistics indicate a steady and slightly increasing level of requests for attorney fees. In almost all of the successful cases, 'prevailing plaintiffs' have either been awarded attorney's fees or had their cases settled for a figure that takes into account and represents the costs of representation.
>
> "A final important finding is the fact that although most of the cases are brought against judges for actions committed within their judicial roles, the successful cases (with only a few exceptions) concern administrative or nonadjudicative conduct."[18]

As this subcommittee knows from its hearings on the Legal Fees Equity Act, costs imposed on local, state, and federal governments under federal fee shifting statutes are an ever growing burden. While the overwhelming majority of fee awards are against officials of the executive branch, the judiciary, as indicated by the study above, has been increasingly involved, primarily in civil rights actions challenging decisions by judges in their rulemaking, enforcement, and administrative or magisterial roles as well as in the adjudication of cases. For many state judges, particularly those with rulemaking and management responsibilities, suits challenging their non-judicial actions may be the most burdensome. Thus, the Conference of Chief Justices supports legislation that would remove the threat of fee awards in cases challenging all actions taken by judges in their official capacities.

Such fees, particularly when incident to federal injunctive relief, are unnecessary and counterproductive. They are unnecessary because adequate remedies are available within state judicial systems through the normal channels of appeal. They are counterproductive because they serve no public interest more important to a free society than the doctrine of judicial immunity underlying the detachment and integrity of the judicial process. The threat of catastrophic economic loss, however subtle, necessarily undermines that process and therefore undermines the rights of all. In the Pulliam case, as we have noted, the original complaint protested incarceration for failure to make bail on a non-jailable offense. This complaint was taken directly to a federal district court, bypassing the Virginia district and appellate courts with full power to provide relief under Virginia law. The final claims for attorney's fees in this case were in excess of $80,000 and resulted in a final settlement between $40,000 and $50,000 for which the state magistrate, as we understand it, was personally liable. Fortunately for her the burden was assumed by the state but charged against the budget of the judiciary where, presumably it required a cutback in judicial services available to the people of Virginia.

The long and complex history of immunity doctrines attests to the judiciary's need, along with that of legislators and prosecuting attorneys, for a stricter standard than that generally granted to the executive officials that Congress had most clearly in mind in passing the Attorneys Fees Act in 1976. More so than most other, if not all public officials, judges are personally charged with responsibility for discretionary decisions affecting the most precious rights of their fellow citizens. There will be one or more disgruntled parties in virtually every judicial proceeding, civil or criminal. Judges, obviously, are in the business of judging, and to judge in the United States today is to weigh the merits of conflicting claims and rights against requirements of the most complex and volatile body of law known to man. Our system therefore recognizes that judges may err and provides for the correction of judicial error through appeal by right to higher tribunals. Thus, judges make difficult factual and legal determinations on a daily basis and routinely rule on unsettled questions of law or settled questions that can change on appeal. Under Pulliam such decisions now can come back to haunt state judges in the form of injunctive relief and attorney's fees ordered by a federal district court.

Even more intimidating, as Justice Powell noted in his dissent in Pulliam, is the threat of contempt if a state judge, in the view of a federal judge, fails to adequately implement the federal court's injunctive order. The order at issue in Pulliam, as Justice Powell noted, contained language requiring discretionary action by the state magistrate involved. This led Justice Powell to conclude that:

> "The threat of contempt — with the possibility of a fine or even imprisonment — could well deter even the most courageous judge from exercising this discretion independently and free from intimidation."[19]

Surely Congress did not intend, in a limited and carefully crafted reaction to the Alyeska decision, to encourage or set the stage for so dramatic an extention of federal judicial power over state judicial proceedings.

None of this in intended, of course, to suggest that state judges should be beyond the reach of the federal courts to redress violations of federally protected rights insofar as claims for damages and injunctive relief are concerned. Nor would anything we propose effect existing rights to redress routinely available by writ of certiorari in the Supreme Court of the United States and by writ of habeas corpus in federal district courts. But we do contend that state courts are as dedicated to the protection of federal rights as are the federal courts and that error, if it occurs, normally can be corrected on appeal within the state court systems. Surely we can now agree that state courts should no longer be compared to some courts in the turbulent Reconstruction Era. Under the Supremacy Clause, the oath of state judges requires the same fidelity to the Constitution and laws of the United States as does the oath of their brethren on the federal bench. There is little reason to believe in the 1980s that state judges are violating that oath, or that they are uninformed on questions of federal law, especially at the appellate level. As Chief Justice W. Ward Reynoldson of Iowa stated in recent testimony before the Senate Judiciary Committee, "there is hard evidence to show how intertwined state and federal law has become." Among the 281 published opinions of the Iowa Supreme Court in 1981, he said, 150 involved criminal appeals. Seventy-two of these opinions cited a total of 327 federal decisions. In addition, 53 federal cases were cited in eight post-convictions and 57 civil cases cited a total of 188 federal opinions. Twenty of the opinions, he added, cited the United States Code and 27 cited the federal rules of civil or criminal procedure or the federal rules of evidence. "I am convinced," Chief Justice Reynoldson said, "that Iowa appellate justices spend almost as much time in the federal reporters as in state reporters. Downgrading the sense of responsibility, experience and training of modern-day state judges ignores the enormous strides made in state judicial systems."[20] That is a view I emphatically share as would the overwhelming majority of my colleagues on state supreme courts. And all of us could, I am certain, cite similar statistics illustrating the increasing importance of federal rules, procedures, and case law in state adjudications.

In the final analysis Pulliam is harmful to the administration of justice because it deters state judges from enforcing the law. Hardly a week goes by without a judge of the courts of Oregon receiving threats of suits by disgruntled litigants. Some judges, in face of the threat of a substantial attorney fee award say, "It's not worth it," and yield.

Let me give an example of this threat from my own experience. Oregon has a statute that provides for the recapture of a portion of the fees paid by the state to counsel assigned to indigent defendants. Before ordering such repayment by the defendant the case must be closed and the court must determine that he is financially able to bear the expense.[21]

Under this statute a trial judge assessed an indigent defendant, who was acquitted of a criminal charge, with the cost of the court-appointed attorney's fee. The defendant brought suit against me as Chief Justice in the United States District Court, requesting injunctive relief, Fitch v. Belshaw.[22]

The federal judged ruled in favor of the plaintiff and entered an award of attorney fees against me in the sum of $35,000. The court held:

"Oregon Revised Statute 135.055(6) allows a judgment to pay costs of court-appointed counsel to be entered against an indigent defendant, with no procedure to insure defendant is or will be able to repay without substantial hardship. In practice, the State draws attention to the potential obligation at the time an indigent defendant requests court-appointed counsel. I find that ORS 135.055(6) unconstitutionally chills an indigent's exercise of Sixth Amendment right to counsel."

* * * * * *

"Oregon Revised Statute 135.055(6) cannot be constitutionally applied in absence of the safeguards of procedural due process. The statute provides neither notice nor hearing. There is no evidence that the State's practice is to supplement the statute with the necessary elements of due process. As a result, indigent defendants are deprived of liberty and property in violation of the Fourteenth Amendment Due Process Clause."

It is important to note that this case involved actions of judges enforcing statutes passed by the Oregon legislature, according to the terms of the statute. Therefore, it involved claims against judges for enforcing laws which, under their oath, they were required to enforce.

I can assure you that the threat of substantial attorney fee awards does not deter judges from conduct they believe to be fair, correct and constitutional. But legislators enjoy immunity from personal liability if acts they pass are later determined to be unconstitutional. Should not judges enjoy immunity from the award of attorney fees for enforcing such laws? Judges take an oath to uphold the law. Freedom from the award of attorney fees under Section 1988 is essential if they are to do so and we are to maintain an independent judiciary.

I am aware of no substantial opposition to the amendment we have proposed. Its passage would have little, if any, effect upon the assertion and enforcement of the rights of citizens under 42 U.S.C. 1983.

A mere contemplatation of the problems confronting state and municipal judges would indicate beyond any doubt that imposing the straight jacket of injunctive limitations upon a judge will destroy his or her usefulness to a far greater extent than the possibility of a suit for damages. Indeed, I suggest that once a judge has been enjoined by an order restricting his or her discretion, the usefulness of that judge is, to all practical intents and pruposes, eliminated. Many times a state judge will not know that he or she has made a mistake until the Supreme Court of the United States issues a new opinion which may destroy the constitutional base upon which the state judge thought the action to be founded. No great citation of authority is needed to establish the proposition that the Supreme Court of the United States has in recent years made a number of changes in its constitutional adjudication that effect the daily decisions of state judges, particularly in relation to the exclusionary rule.

The specter of harassing litigation brought by disappointed parties against judicial officers of all types of jurisdiction is a chilling prospect, indeed. At a time when the courts of this country are overburdened with litigation, at a time when citizens seek redress in the courts for a greater variety of perceived wrongs than ever before, it seems ill-advised to add a new layer of distracting litigation upon the shock troops of the judicial system. Such flank attacks upon judicial officers can only result in increasing timidity and a tendency to avoid close and controversial decisions when ever possible. It inevitably produces a syndrome of responses inconsistent with an American judiciary dedicated to the protection of individual liberties.

Finally, Mr. Chairman, we should not forget that state courts existed before the federal system and for the first 100 years of our national life were the courts of original jurisdiction for federal as well as state law questions. Because they remain the only courts of general jurisdiction, and their jurisdiction cannot be restricted by Congress as can that of the lower federal courts, it is reasonable to view state courts as the ultimate forums for the protection of rights under the federal as well as state constitutions. Modern state courts are responsible components, and partners, in the most fair, sophisticated, and effective system of justice ever devised by man. They should not be viewed as inferior tribunals requiring daily oversight by individual judges on the federal bench. We are confident that Congress, after full deliberation, will share that view and grant us the relief we seek.

Thank you again for your assistance in bringing this critical issue to the attention of Congress. I will be pleased to respond to any questions you may have have and to provide additional materials for the hearing record.

Notes

1. 104 S. Ct. 1970, ___ U.S. ___ (1984); Slip Opinion No. 82-1432, May 14, 1984.

2 42 U.S.C. 1983 reads:
"Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3 42 U.S.C. 1988 reads in pertinent part:
"In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

4 U.S. S. Ct. Slip Opinion No. 82-1432 DISSENT at 1.

5 No. 82-1432 at 20.

6 421 U.S. 240 (1975)

7 Senate Report No. 94-1011, 94th Congress, 2d Session. The Report states that there were 30 witnesses, including "Federal and State public officials", during six days of hearings in 1973. But it does not identify the public officials or indicate what their testimony might have been.

8 Senate Report No. 94-1011 at 6.

9 386 U.S. 547 (1967)

10 These are not available via the Senate Judiciary Committee's Document Room.

11 "Awarding of Attorneys' Fees", Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, 94th Congress, 1st Session, October 6, 8, and December 3, 1975. Serial No. 64.

12 121 Cong. Rec. S. 14975 (daily ed., Aug. 1, 1975),

13 122 Cong. Rec. 35126

14 Recent articles include "The Twilight of Judicial Independence — Pulliam V. Allen", an unpublished manuscript by Justice Joseph R. Weisberger of the Supreme Court of Rhode Island, prepared for publication in the January, 1986 edition of the Suffolk University Law Review. The Summer 1982 edition of "The State Court Journal", published by the National Center for State Courts, Williamsburg, Va., contains articles tracing the history of the judicial immunity doctrine, a national survey of suits against judges, and a review of recent literature on judicial immunity.

15 The key cases before Pulliam v. Allen are discussed in the "State Court Journal" cited above.

16 The Conference of Chief Justices' Official policy position: "Urges the United States Congress to exempt state judges and judicial officers, acting in their official capacities, from assessment of attorney fees pursuant to 42 U.S.C. 1988."

17 In "Survey of State Statutes and Current Activities Regarding Judicial Immunity, Indemnification and Insurance", conducted by the National Center for State Courts, Williamsburg, Va., for the Conference of Chief Justices Ancillary Committee on Judicial Immunity and Ancillary Task Force to Prepare Report on Impact of Pulliam v. Allen, January 1985.

18 In "42 U.S.C. 1983 Litigation Against Judges: Survey Results", prepared by the National Center for State Courts for the Conference of Chief Justices Task Force to Prepare a Report on the Impact of Pulliam v. Allen, September 1985.

19 No. 82-1432 DISSENT at 11.

20 In Hearings of the Senate Judiciary Committee, 97th Congress, 2d Session, on S. 2216, The Habeas Corpus Reform Act of 1982, April 1, 1982, Serial No. J-97-108, at 238.

21 The statute provides:

"Upon completion of all services by the counsel appointed pursuant to ORS 135.045 or 135.050, the court shall determine whether the person for whom counsel was appointed is able to pay a portion of the compensation and expenses paid by a county or the state. In determining whether the person is able to pay such portion, the court shall take into account the other financial obligations of the person, including any fine or order to make restitution. In addition to any agreement to repay under ORS 135.050(4), if the court determines that the person is able to pay such portion, the court may order the person to pay the portion to the appropriate officer of the county or state."

22 USDC, Or., Civ. No. 83-991-PA.

Senator HATCH. Judge Dillin, we'll turn to you.

STATEMENT OF S. HUGH DILLIN

Judge DILLIN. Thank you, Mr. Chairman.

I am here today on behalf of the Judicial Conference of the United States, being the chairman of its subcommittee on Federal/State relations. I, too, have previously filed a statement which, I trust, will be made a part of the record.

We are very pleased, Mr. Chairman, that you and Senator Thurmond have introduced Senate bills S. 1794 and S. 1795 which are directed at a problem which, in our view, is the most serious ever to threaten the independence of the State judicial system. I might add that I can see a possible spillover into the Federal judicial system, as well.

So we are deeply in your debt for the opportunity these bills provide for us to bring this threat to the attention of the Congress.

Our subcommittee, Mr. Chairman, I might say, is a little bit different in that it's composed of five Federal judges and four State judges. One of the initial members of the committee was then-Justice Dallin H. Oaks, of the Supreme Court of Utah, who as you know has now gone on to other duties.

Immediately after the *Pulliam* decision and after it was called to the attention of the Judicial Conference by the Conference of Chief Justices, we went to work on it, recommended a change, and that went through the Judicial Conference almost at once, which is unusual with that body.

As Justice Peterson has said, the judicial immunity, like legislative immunity, has been with us for centuries and we think that to the extent that *Pulliam* has chopped a large hole in that doctrine the common law should be restored.

I think it is interesting that in the *Pulliam* decision itself the majority conceded that the petitioner's reasoning was logical when she argued that attorneys' fees are the functional equivalent of monetary damages, and that the chilling effect of a damages award is no less chilling when the award is called attorneys' fees. Yet after recognizing the truth of that position, the majority of five to four went on to hold that it was for Congress to change the law if it wanted it changed.

This has all come about in the past 10 years starting with the *Alyeska Pipeline* decision where the Court, again by a divided vote, held that attorneys' fees could not be awarded unless the statute so provided. So the Congress, at that time, undertook to make attorneys' fees allowable in civil rights cases and I'm sure that they didn't once think about the possibility that attorneys' fees would be awarded against judges.

These bills, if passed, would rectify that oversight, as I believe it to be, and put the situation back to where it was until just a few years ago.

There have been something like 500 suits against State court judges filed just in the past year. This not only tends to destroy judicial immunity, but it puts State court plaintiffs in a position of, in effect, appealing to the Federal courts to enjoin State court action when they ought to be in the State courts appealing right on up through the State judicial system.

So besides the chilling effect of monetary damages, *Pulliam* also is disrupting the normal flow of legislation as between the State and Federal courts.

Senator HATCH. Thank you. It is a privilege to have two distinguished judges with us today.

[Statement follows:]

PREPARED STATEMENT OF S. HUGH DILLIN

Mr. Chairman, I am S. Hugh Dillin, a United States District Judge for the Southern District of Indiana. I presently serve as chairman of the Subcommittee on Federal-State Relations of the Court Administration Committee of the Judicial Conference of the United States. This Subcommittee, Mr. Chairman, is unique in the Judicial Conference policy structure - four of its nine members are State court judges.

The Subcommittee was established only a few years ago in recognition of the importance of the Federal-State judicial relationship and to provide a forum for the exchange of ideas and concerns on this subject. The Subcommittee has also become a focal point for Judicial Conference liaison and cooperation with the Conference of Chief Justices. These contacts have been most valuable in developing better communications between the two judicial systems.

I am appearing here today to discuss the position of the Judicial Conference with respect to the liability of State judges for attorneys' fees under 42 U.S.C. § 1988. As you know, Mr. Chairman, the Judicial Conference has formally presented to the Congress a proposed bill to eliminate awards of attorney fees in a suit against a judge or judicial officer who would be immune from actions for damages arising out of the same act or omission about which complaint is made. This bill has been introduced in the Senate by Senator Thurmond as S.____.

This proposal is best understood in light of the history of the doctrine of judicial immunity. Judicial immunity, like legislative immunity, is a doctrine which is centuries old, with its roots in the common law. Such immunity exists not for the benefit of the judge or legislator, but for the benefit of the people, by enabling such officials to execute the functions of their offices with independence and without fear of consequences. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

Absolute judicial immunity applies to tort actions for damages, including 42 U.S.C. § 1983 civil rights actions, for a judicial decision within the court's jurisdiction, even if alleged to have been made corruptly or maliciously. *Bradley v. Fisher*, *supra*; *Pierson v. Ray*, 386 U.S. 547 (1967). Jurisdiction, for these purposes, is satisfied if the decision involves a function normally performed by a judge and the parties were dealing with the judge in his judicial capacity. Stump v. Sparkman, 435 U.S. 349 (1978). Immunity from civil actions for nonjudicial official conduct by a judge is determined by reference to the rules normally applicable to that type of activity. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980).

In May 1984, the Supreme Court held by a 5 to 4 vote that, while damages may not be awarded, judicial immunity does not bar the award of attorneys fees against State court judges under 42 U.S.C. § 1988, in cases where the plaintiff prevails in, for example, a suit for injunctive or declaratory relief pursuant to 42 U.S.C. § 1983. Pulliam v. Allen, ___ U.S. ____, 104 S.Ct. 1970 (1984). The majority conceded that there was logic to the petitioner's reasoning that "attorneys fees are the functional equivalent of monetary damages . . ." and that "the chilling effect of a damages award is no less chilling when the award is denominated attorney's fees." However, it held that it was for Congress, not the Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity, and that § 1988 had eliminated such immunity as to attorneys fees.

On August 2, 1984, the Conference of Chief Justices adopted resolutions that, among other things, urged the Judicial Conference of the United States to:

> initiate an early study of the exemption of state judges and judicial officers acting in their official capacities from the provisions of 42 U.S.C. Sec. 1988 and to support efforts to amend 42 U.S.C. Sec. 1988 to exempt state judges and judicial officers, acting in their official capacities, from the assessment of attorney fees.

Our Subcommittee found that there is great concern on the part of State judges and judicial officers with respect to the impact of the Pulliam decision. These concerns include: (1) a chilling effect on judicial independence and judicial detachment; (2) the creation of a new class of Federal litigation against State judicial decisions; (3) adding an attorney fees incentive likely to encourage more litigation against judges; (4) encroachment upon the doctrines of federalism, exhaustion of State remedies, judicial restraint and comity; and (5) the threat of heavy financial burdens, albeit in the form of attorney fees, arising from performing the duties required of the judge in the ordinary course of litigation.

With respect to the concern directed at the punitive effect of assessment of attorney fees under 42 U.S.C. § 1988, the initial fears are proving well founded. In the first instance, I understand that the relatively modest initial attorney's fee award of $7,038 in the Pulliam case mushroomed to a request for an additional $88,000 following the decision by the Supreme Court. The claim was ultimately settled for $36,000. Attorney fees were also awarded against the Supreme Court of Virginia for litigation over the constitutionality of the promulgation and enforcement of a rule prohibiting attorney advertising. Consumer Union of the United States, Inc. v. American Bar Association, 505 F.Supp 822 (E.D.Va. 1981), aff'd in relevant part, 688 F.2d 218 (4th Cir. 1982), cert. denied, 462 U.S. 1137, 103 S.Ct. 3124 (1983)(Burger, C.J., Rehnquist, J., dissenting). The Supreme Court of Virginia ultimately settled for $98,000 for attorney fees in the case. Attorney fees of some $35,000 have been awarded by the United States District Court for the District of Oregon against Chief Justice Edwin J. Peterson of the Oregon Supreme Court, and others, in a case in which the District Court enjoined recoupment of attorney fees from acquitted indigent defendants as provided in the Oregon recoupment statute Finch v. Belshaw, Civ. No. 83-991 PA, D.Ore., 1984. In Morrison v. Ayoob, 727 F.2d 1100 (3rd Cir. 1984), a case from the Western District of Pennsylvania, fees for the substantive case plus subsequent fee litigation amounted to $24,211.20. The original case - ultimately dismissed as moot because defendants had altered their mode of operation - challenged the practice of sending convicted indigents to jail for petty offenses without affording right to counsel.

The attorney fees awarded in these cases were ultimately paid by a governmental unit and not by a judge in his or her individual capacity. The fact remains that each case which joins a judge as an individual places an open ended financial threat against the judge for making honest judicial decisions for which a governmental unit may not be liable. See Kentucky v. Graham, 105 S.Ct. 3099, ___ U.S. ____ (1985). Indeed, the State of Virginia was not legally bound to pay the fees assessed in Pulliam. The Judicial Conference has concluded that to place such a burden on a judge or judicial officer acting in a judicial capacity is an unsound and counterproductive policy.

In addition, the provision for attorney fees for successfully challenging a State judicial decision in a Federal court artificially encourages Federal litigation against State judges. No one would argue that a State judge should pay the attorney fees for judicial decisions reversed on appeal within the State judicial system. Why should the result be different when the Federal court is acting, in effect, as the "appellate" court? To maintain such a difference unnecessarily adds to the friction between the Federal and State systems.

In sum, Mr. Chairman, the Judicial Conference of the United States urges the Subcommittee to adopt legislation that would overrule the Pulliam case insofar as it would permit attorney fees to be awarded in a suit against a State judge or judicial officer who would otherwise be immune from damages arising out of the same act or omission about which complaint is made.

Thank you. I will be glad to answer any questions.

Senator HATCH. In 1868, one of the judges of the Court of Exchequer delivered an opinion which seems applicable to the question raised by the *Pulliam* decision. He opined that:

> It is essential in all courts that the judges who were appointed to administer the law should be permitted to administer it under the protection of the law independently and freely without favor or fear.
>
> This provision of the law, judicial immunity, is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.

Now, it seems to me that whether we label the potential liability of judges as "damages" or "attorneys' fees", he or she is still subject to monetary penalties for taking certain actions.

Now, to what degree have you two judges observed a growth in the number of cases filed against judges? To what degree does the growth of litigation against judges threaten the principle of judicial immunity?

Could we start with you, Justice Peterson?

Judge PETERSON. Well, Senator, I brought with me a sheaf of papers. I get a little notice every time a suit is brought against a judge and I brought a sheaf of papers with me from those suits filed last week.

I think three of the lawsuits filed last week were based upon claimed violations of civil rights. Of course, most of them are pro se and most of them will be dismissed out of hand.

In 1982, a total of 176 claims were filed against judges in the United States under the Civil Rights Act. It increased to 253 in 1983, 377 in 1984. We estimate that there will be 525 filed in 1985.

There is no question that there is a growth in such claims far in excess of the normal growth in litigation generally. Now, I think that it does threaten the principal of judicial immunity.

The point was made by Judge Powell in his dissent in *Pulliam*. He said, whether you call it damages of attorney fees the threat is identical. He said, "The burdens of having to defend such a suit are identical in character and degree whether suit before damages or prospective relief."

Senator HATCH. Well, thank you.

Judge Dillin, do you care to comment on that?

Judge DILLIN. No.

Senator HATCH. Let me ask you another question. Many States have provided, by statute, a means to pay any potential fee liability a judge may incur within his judicial capacity. Thus, in these States, the judge would not be personally liable for fees.

I am going to ask both of you this question. Do you feel that this permits a judge to rule, as I stated earlier, without fear of consequences? Let's go with you first, Judge Dillin.

Judge DILLIN. I think that any time you subject a judge to a lawsuit before a judge in another court that you are demeaning the independence of the judiciary. Not only that, but I don't believe that—certainly not a majority of the States have adopted such a rule.

Senator HATCH. Thank you. Justice Peterson.

Judge PETERSON. Mr. Chairman, it's surprising. Most people think of judges as people with great power.

It is true, judges do have the power to exercise power; but when they personally are concerned, again and again I talk to trial judges and they are intimidated in the same way that any other potential litigant is intimidated by the threat of litigation. They don't like to be sued.

Senator HATCH. They don't like the adverse publicity that comes.

Judge PETERSON. No. In Oregon, judges stand for election just like members of the legislature do. This is a great deterrent to the exercise of their independent judgment.

Senator HATCH. How many States, Mr. Justice, have made no such provisions to pay the judges' potential fees out of public moneys or public coffers?

Judge PETERSON. I am referring to a report dated January 1984 entitled "Survey of State Statutes and Current Activities Regarding Judicial Immunity, Indemnification and Insurance." According to page 7 of that report, 15 of the 55 responding jurisdictions reported that they had a judicial indemnification statute.

The reason that there are more than 50 responding jurisdictions, Mr. Chairman, is because the Conference of Chief Justices also includes the chief judicial officer of such entities as Guam and Puerto Rico, and some other territories.

But so far as the statutes are concerned only 15 States have the indemnification statutes. I suspect that a greater number than that would indemnify the judge if an attorney fee award were returned against the judge, but so far as the record is concerned it appears 15 States have that.

Senator HATCH. In drafting legislation to restore the full breadth of judicial immunity, would you recommend that Congress draw distinctions between actions a judge undertakes in his judicial capacity as contrasted with actions a judge undertakes in his administrative capacity? In other words, should a judge be exempt for suit for administrative actions—like hiring clerks, overseeing prisons, et cetera—as well as for judicial decisions?

Judge **Dillin**. Well, Senator, if the action he takes is official action within his jurisdiction, I don't think there should be any distinction. Otherwise, you're going to have more lawsuits over how many angels can dance on the point of a pin.

I mean, is it judicial, is it administrative? What is it? If it is within his jurisdiction, it should be protected. If he is just clear out in left field, of course it should not.

Senator **Hatch**. Do you have any comment, Judge Peterson?

Judge **Peterson**. Mr. Chairman, could I just briefly supplement that response?

I, of course, agree. In today's age, the official activities of judges are of a much broader nature than was the case 50 years ago.

For example, in the case that I referred to a moment ago where I have overall supervisory responsibility of the judges in Oregon, that involved application of the laws as to which the same principles of immunity should apply; though, of course, if I go out and hassle my female judicial assistant and, thereby, violate her civil rights, I would think that I should be liable for that.

But in such things as the application of statutes where we are simply following the mandate of the legislature, the immunity should, I submit, be broad.

Senator **Hatch**. Thank you.

I want to thank both of you for appearing. We have Senator Grassley to whom I want to turn next.

Senator DeConcini, who is our ranking minority member, would have liked to have been here today, but he is necessarily absent because—like Senator Thurmond—is attending another hearing on his own bill. Therefore, he wanted me to apologize to both of you, but make it clear that he will pay very close attention to this record and what you have to say as well as other witnesses.

Let's turn to Senator Grassley. We're happy to have you here, Senator.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator **Grassley**. Mr. Chairman, I have three things. One is a question to the panel. Another one is to ask if either you, or I can do it in writing, will ask some questions for me of the last panel because I have to go to another meeting.

The third thing is, in regard to my interest in this attorneys' fee area and how it interacts with the Equal Access to Justice Act, I don't know when you are going to close the record on this set of hearings but I would like to have a week or so to ask some questions in writing of the Department of Justice because of some doubt in our mind as to where the attorneys' fee award would be made.

Senator **Hatch**. We'll keep the record open.

Senator **Grassley**. Under equal access to justice, awards can be made at the settlement point as well as at final judgment. I want to know how the DOJ feels that their bill deals with settle situations.

Senator **Hatch**. Alright.

Senator **Grassley**. My question to the panel is whether or not the solution to the problem posed by the *Pulliam* case is as simple as amending the last sentence of section 1988.

Judge **Dillin**. Well, Senator, that is the feeling, at least, of the Conference of Chief Justices and the Judicial Conference of the United States: that since judicial immunity has been so well understood for all these centuries, if we simply say, well, we are still going to observe that attorneys' fees count as being under the immunity doctrine, that should be sufficient, we feel.

Senator **Grassley**. Judge Peterson, do you feel the same way?

Judge **Peterson**. Senator, yes. I think that the proposals in S. 1794/S. 1795 would largely take care of the *Pulliam* problem.

Senator **Grassley**. Mr. Chairman, that's all the questions I have.

Senator **Hatch**. Well, thank you so much.

I want to thank both of you for your efforts. I think you have been very helpful to the committee. Judge Peterson, also would like to put that document that you introduced us to into the record as part of our official record of these hearings.

Judge **Peterson**. I will see that that's provided.

Senator **Hatch**. Fine. Without objection, then, we will do that.

[Conference of Chief Justices report follows:]

CONFERENCE OF CHIEF JUSTICES

SURVEY OF STATE STATUTES AND CURRENT ACTIVITIES REGARDING JUDICIAL IMMUNITY, INDEMNIFICATION AND INSURANCE

Conference of Chief Justices

Ancillary Committee on
Judicial Immunity

Ancillary Task Force to
Prepare Report on Impact of
Pulliam v. Allen

January, 1985

SURVEY OF STATE STATUTES AND CURRENT ACTIVITIES REGARDING JUDICIAL IMMUNITY, INDEMNIFICATION AND INSURANCE

Background:

At its Annual Meeting in August 1984, the Conference of Chief Justices surveyed its membership on the related topics of judicial immunity, state indemnification practices and insurance policy coverage. Follow-up surveys and verification of the information resulted in 100% participation and relatively complete responses.

Approximately half of the respondent Chief Justices reported that their jurisdictions have neither statutory indemnification nor insurance coverage for judges involved in litigation concerning their official duties. Fifteen states reportedly have indemnification statutes; another four appear to have some type of state indemnity practice. Only nine states provide statutory immunity to their judges. Fourteen respondents reported that their jurisdictions have insurance that pays for some or all of the expenses involved in the litigation of claims against judges.

Although almost all of the states have representation provided by the Attorney General (or other public legal office), specific information on the types of coverage for damages and attorney's fees provided under insurance policies and indemnification statutes is not comprehensive and was unknown by many respondents.

Legislative activity to remedy the situation is currently minimal. Although 46 respondents reported not having judicial immunity statutes, 72% responded that such legislation is not being sought. Similarly, in the 40 states without statutory indemnification, 60% are not seeking such protection.

Slightly more activity is being directed toward the procurement of insurance. 45% of the respondents report current negotiations for state-provided judicial insurance. 44% report that individual judges are beginning to purchase their own insurance policies.

Further summary information and charts on each question follow.

I. Jurisdictions with Judicial Immunity Statutes

Summary of Survey Responses

Of the 55 respondents, 9 (16%) indicated that their jurisdictions have statutes that confer judicial immunity. Forty-six jurisdictions do not have such statutory protection for judges. Of these 46, only 10 respondents (22%) reported that immunity legislation is being sought. Thirty-three respondents (or 72% of the 46 without legislation) indicated that they are not seeking legislation. (Three jurisdictions could not provide information as to whether legislative efforts are underway.)

All Responding Jurisdictions	Does your state have a judicial immunity statute?		If not, are you seeking legislation?	
	Yes	No	Yes	No
ALABAMA		X		X
ALASKA		X		X
AMERICAN SAMOA		X		X
ARIZONA		X		X
ARKANSAS	X (limited)			X
CALIFORNIA		X		X
COLORADO[1]		X		X
CONNECTICUT[2]	X		N/A	

All Responding Jurisdictions	Does your state have a judicial immunity statute?		If not, are you seeking legislation?	
	Yes	No	Yes	No
DELAWARE[3]	X		N/A	
DISTRICT OF COLUMBIA		X	X	
FLORIDA[4]		X	X	
GEORGIA		X		X
GUAM		X		X
HAWAII		X		X
IDAHO		X		X
ILLINOIS		X		X
INDIANA[5]		X		X
IOWA		X	No information	
KANSAS	X		N/A	
KENTUCKY		X		X
LOUISIANA		X		X
MAINE[6]	X		N/A	
MARYLAND		X	X, Possibly in 1985	
MASSACHUSETTS		X		X

All Responding Jurisdictions	Does your state have a judicial immunity statute?		If not, are you seeking legislation?	
	Yes	No	Yes	No
MICHIGAN		X	X	
MINNESOTA		X		X
MISSISSIPPI[7]		X		X
MISSOURI		X		X
MONTANA	X		N/A	
NEBRASKA		X		X
NEVADA		X	X	
NEW HAMPSHIRE		X		X
NEW JERSEY		X		X
NEW MEXICO		X	X	
NEW YORK		X		X
NORTH CAROLINA[8]		X		X
NORTH DAKOTA		X	X	
OHIO		X		X
OKLAHOMA		X	X	

All Responding Jurisdictions	Does your state have a judicial immunity statute?		If not, are you seeking legislation?	
	Yes	No	Yes	No
OREGON		X	X	
PENNSYLVANIA		X	No information	
PUERTO RICO	X		N/A	
RHODE ISLAND		X		X
SOUTH CAROLINA		X		X
SOUTH DAKOTA	X		N/A	
TENNESSEE		X		X
TEXAS		X	X	
UTAH		X		X
VERMONT		X		X
VIRGIN ISLANDS		X	No information	
VIRGINIA		X		X
WASHINGTON[9]		X		X
WEST VIRGINIA		X		X
WISCONSIN		X		X
WYOMING	X		N/A	

1. Colorado - The Colorado Governmental Immunity Act, section 24-10-101, *et seq.*, *Colorado Revised Statutes*, is the primary legal and policy guide governing the liability and indemnification of state court judges (and employees of the Colorado Judicial Department). Section 24-10-114 of the statute provides that the maximum amount of liability in areas of waived immunity is $150,000 per injury or $400,000 per occurrence for all public employees, including judges. The Attorney General's office has informed the Judiciary that in the event of a lawsuit against a judge that the state would be liable for the cost of the employees or officials acting within the scope of their employment, so long as the act or omission complained of is not willful or wanton. The state will also indemnify employees or officials for any personal judgments rendered for acts within the scope of employment. Legal representation under the policy is provided by an outside law firm, with backup from the Attorney General's office. As of 1984, coverage under the policy includes damages rendered pursuant to federal civil rights laws and attorney fees up to $10,000 (with a $1,000 deductible that would be picked up by the agency involved for the defendant).

2. Connecticut - §4-165 of the Connecticut Statutes confers immunity for all state officers or employees, provided the conduct complained about was not wanton, reckless or malicious, was caused in the discharge of one's duties or was within the scope of one's employment.

3. Delaware - 10 Del. C. §4001.

4. Florida - No statute but respondent indicates that common law protects judges.

5. Indiana - No statute but *Cato* v. *Mayes*, 388 N.E. 2d 530 (19) established that judges are immune from civil liability for their official acts.

6. Maine - 14 M.R.S.A. §811(1)B of the Maine Tort Claims Act.

7. Mississippi - The Chief Justice reports that the Conference of Mississippi Judges, consisting of Supreme, Chancery, Circuit and County Court Judges, has appointed a committee to study the overall question of judicial immunity and insurance. To date, the committee has not made any report or recommendation.

8. North Carolina - Judicial immunity has been established by case law: *Sutton* v. *Figgatt*, 280 N.C. 89 (1971); *Foust* v. *Hughes*, 21 N.C. App. 286, *cert. denied*, 285 N.C. 589 (1974). Principle appears to apply to all judges, magistrates, and clerks of superior courts exercising a judicial function.

9. Washington - A report on this matter was to have been presented at the state's Judicial Conference in late August, 1984.

II. Description of Statutes on Judicial Immunity

Summary of Survey Responses:

Nine responding jurisdictions reported having statutes on judicial immunity. Four of these indicated that only trial or appellate judges are included under the statute. One respondent answered that all judicial officers are included and four reported that all state employees are conferred immunity by the statute.

Respondents with Statutes on Judicial Immunity	Are judicial officers other than trial or appellate judges included?		Which types?
	Yes	No	
ARKANSAS		X	
CONNECTICUT	X		All state officers or employees
DELAWARE	X		All public officers and state employees
KANSAS		X	
MAINE	X		Any employees of governmental entities
MONTANA	X		All judicial officers
PUERTO RICO		X	
SOUTH DAKOTA	X		All state employees
WYOMING		X	

III. Jurisdictions with Judicial Indemnification Statutes

Summary of Survey Responses

Fifteen of the 55 responding jurisdictions (27%) reported that they have a judicial indemnification statute. Also note that although Alaska, California, Colorado and Oregon answered in the negative, additional information taken from the questionnaire and supplied in the footnotes indicates the existence of statutory protection for judges.

Of the 40 jurisdictions that indicated not having a statute, 12 (30%) reported that such legislation is being sought. 24 of these 40 (60%) reported that the judiciary is not seeking indemnification legislation. Four of the 40 jurisdictions without statutes had no legislative information. Michigan has a general statute, but judges there will seek additional statutory coverage.

All Responding Jurisdictions	Does your state have a judicial indemnification statute?		If not, are you seeking such legislation?	
	Yes	No	Yes	No
ALABAMA		X		X
ALASKA[1]		X		X
AMERICAN SAMOA		X		X
ARIZONA		X		X
ARKANSAS		X		X
CALIFORNIA[2]		X		X

All Responding Jurisdictions	Does your state have a judicial indemnification statute?		If not, are you seeking such legislation?	
	Yes	No	Yes	No
COLORADO[3]		X		X
CONNECTICUT[4]	X		N/A	
DELAWARE[5]	X		N/A	
DISTRICT OF COLUMBIA		X	X	
FLORIDA		X	X	
GEORGIA	X		N/A	
GUAM		X		X
HAWAII		X		X
IDAHO		X		X
ILLINOIS	X		N/A	
INDIANA		X		X
IOWA	X		N/A	
KANSAS		X	X	
KENTUCKY		X		X
LOUISIANA		X		X

All Responding Jurisdictions	Does your state have a judicial indemnification statute?		If not, are you seeking such legislation?	
	Yes	No	Yes	No
MAINE[6]	X		N/A	
MARYLAND		X	X, Possibly 1985	
MASSACHUSETTS		X		X
MICHIGAN	X (general statute)		X	
MINNESOTA		X	X	
MISSISSIPPI		X		X
MISSOURI[7]	X		N/A	
MONTANA		X		X
NEBRASKA	X		N/A	
NEVADA		X	X	
NEW HAMPSHIRE	X		N/A	
NEW JERSEY		X	No information	
NEW MEXICO		X	No information	
NEW YORK	X		N/A	

All Responding Jurisdictions	Does your state have a judicial indemnification statute?		If not, are you seeking such legislation?	
	Yes	No	Yes	No
NORTH CAROLINA[8]	X			X
NORTH DAKOTA		X	X	
OHIO		X	X	
OKLAHOMA		X	X	
OREGON[9]		X	X	
PENNSYLVANIA		X	X	
PUERTO RICO		X	No information	
RHODE ISLAND		X		X
SOUTH CAROLINA		X		X
SOUTH DAKOTA		X		X
TENNESSEE		X		X
TEXAS		X	X	
UTAH	X		N/A	
VERMONT	X		N/A	
VIRGIN ISLANDS		X	No information	

All Responding Jurisdictions	Does your state have a judicial indemnification statute?		If not, are you seeking such legislation?	
	Yes	No	Yes	No
VIRGINIA		X		X
WASHINGTON		X		X
WEST VIRGINIA		X		X
WISCONSIN[10]	X (A general statute that may apply to judiciary)		No information	
WYOMING		X		X

1. Alaska - Although the respondent from Alaska indicated that there is no statute conferring indemnification, further clarification included the following information: "The State of Alaska will protect employees (including judicial officers) from liability arising out of and during the course of bona fide employee conduct. Wilful misconduct or illegal acts will not be protected. The State will also reimburse judges for costs incurred in defending against charges before the Judicial Conduct Commission, if the judge is exonerated and if the State is notified in advance of the proceeding."

2. California - But consider comments by Ralph Gampell, Director, Judicial Council: "Government Code sections 825-825.4 provide that a public entity must pay the judgment, compromise, or settlement arising out of a suit brought against its employees for acts or omissions occurring in the course and scope of the employee's employment. "Employee" as the word is used in those sections includes a "judicial officer" as defined in section 28 of the Election Code." (Gov. Code, §810.2). The right to indemnification under Government Code section 825 also includes "damages" arising out of any claim or action grounded on the federal Civil Rights Act (42 U.S.C., §1983). (Williams v. Horvath (1976) 16 Cal. 3d 834, 842-848.)"

3. Colorado - See footnote 1 in question I.

4. Connecticut - P.A. 83-464 §3 indemnifies any state officer or employee if he is found to have been acting in the discharge of his duties or within the scope of his employment and the act or omission is found not to have been wanton, reckless or malicious.

5. Delaware - 10 Del. C. §4002.

6. Maine - 14 M.R.S.A. §8112(1)(2) of the Maine Tort Claims Act.

7. Missouri - Mo. Rev. Stat. §105.711 establishes a Legal Expense Fund, available for the payment of any claim required by any final judgment against the state or its officers and employees.

8. North Carolina - N.C. Gen. Stats. §143-300.2 et seq. provides for defense of all state employees in defense of civil or criminal actions in the scope of employment. Respondent indicates that this would include judges, officers and employees of the Judicial Branch. §143-300.6 provide that the state may pay judgments up to $100,000, the maximum amount payable for any one claim under the State's Tort Claims Act.

9. Oregon - There is no indemnification statute, but judges have "coverage" under the Tort Claims Act. Until now, all judgments have been paid either with Tort Claims Funds or Judicial Department Funds.

10. Wisconsin - The Chief Justice responds that he is of the opinion that under the general indemnification statute, official actions of judges (taken in good faith) are covered. He notes that this should be clarified by legislation or decision.

IV. Description of Statutes on Judicial Indemnification

Summary of Survey Responses

Of the fifteen jurisdictions that reported having a judicial indemnification statute, 3 described the provisions as covering trial and appellate judges only. Ten states reportedly provide indemnification for all state employees, including the state court administrator. In Michigan and New York, the respondents indicated coverage for judges and the state court administrator only.

Respondents with Indemnification Statutes	Are judicial officers other than trial or appellate judges included?		Which types? State Ct. Administrator	Other Judicial Employees
	Yes	No		
CONNECTICUT	X		X	Any state officer or employee
DELAWARE	X		X	All public officers and state employees
GEORGIA		X		
ILLINOIS		X	X	All state employees
IOWA	X		X	All who are state employees

Respondents with Indemnification Statutes	Are judicial officers other than trial or appellate judges included?		Which types? State Ct. Administrator	Other Judicial Employees
	Yes	No		
MAINE	X			Employees of governmental entities
MICHIGAN	X		X	
MISSOURI	X		X	Any officer or employee of the state, or agency thereof
NEBRASKA	X		X	All state officers
NEW HAMPSHIRE	X		X	All state employees
NEW YORK	X (probably)		X	
NORTH CAROLINA	X		X	All state employees
UTAH		X	X	
VERMONT	X		X	All state officers
WISCONSIN	No information			

V. Jurisdictions that Provide Judicial Insurance

Summary of Survey Responses

Fourteen of the 55 respondents (25%) advised that their jurisdictions pay premiums on judicial insurance. Note that although the respondents from Colorado, Maryland, New Mexico, and North Carolina responded negatively to the existence of state paid insurance premiums, they qualified their answers by giving additional information on insurance plans in their jurisdictions, which do provide protection for judges. In Guam, there is authorization for insurance, which has not been procured.

Coverage varies under these policies. Five respondents described coverage for all state employees. Two reported coverage for judicial branch employees and judges. In the District of Columbia, hearing commissioners are included. Four jurisdictions responded that their policies covered judges only.

Forty responding jurisdictions (73%) reported that their states do not pay the premiums on judicial liability insurance. (Again, 4 of these did note that state insurance plans were in effect.)

Only 5 jurisdictions reported any involvement of localities in judicial insurance. In Wyoming, both the state and some localities pay insurance premiums. In Illinois, Michigan, Missouri and Ohio, some of the localities (but not the state) pay insurance premiums for their judges.

Texas did not provide information on state paid insurance.

All Responding Jurisdictions	Does your state pay the premiums on judicial liability insurance?		Who else does the policy cover?
	Yes	No	
ALABAMA	X		No information provided
ALASKA		X	
AMERICAN SAMOA		X	
ARIZONA[1]	X		State officers
ARKANSAS		X	
CALIFORNIA		X	
COLORADO[2]		X	But there is a state liability policy for all state employees
CONNECTICUT		X	
DELAWARE		X	
DISTRICT OF COLUMBIA	X		Hearing Commissioners
FLORIDA		X	
GEORGIA	X		Judges only
GUAM[3]		X	
HAWAII		X	

All Responding Jurisdictions	Does your state pay the premiums on judicial liability insurance?		Who else does the policy cover?
	Yes	No	
IDAHO	X		Supreme Court Clerk Staff attorneys
ILLINOIS[4]		X	
INDIANA		X	
IOWA		X	
KANSAS		X	
KENTUCKY		X	
LOUISIANA		X	
MAINE		X	
MARYLAND[5]		X	
MASSACHUSETTS		X	
MICHIGAN[6]		X	
MINNESOTA		X	
MISSISSIPPI		X	
MISSOURI		X	

All Responding Jurisdictions	Does your state pay the premiums on judicial liability insurance?		Who else does the policy cover?
	Yes	No	
MONTANA	X, a state operated plan		Justices of the Peace City Judges Water Court Judges
NEBRASKA		X	
NEVADA		X	
NEW HAMPSHIRE		X	
NEW JERSEY		X	
NEW MEXICO[7]		X	
NEW YORK		X	
NORTH CAROLINA[8]		X	
NORTH DAKOTA	X		Referees, juvenile supervisors
OHIO		X	
OKLAHOMA		X	
OREGON		X	
PENNSYLVANIA		X	

All Responding Jurisdictions	Does your state pay the premiums on judicial liability insurance?		Who else does the policy cover?
	Yes	No	
PUERTO RICO	X (state insured)		No information
RHODE ISLAND	X		Judges only
SOUTH CAROLINA		X	
SOUTH DAKOTA	X		All state employees
TENNESSEE		X	
TEXAS	No information		
UTAH		X	
VERMONT		X	
VIRGIN ISLANDS	X		Judges only
VIRGINIA	X		All state employees
WASHINGTON		X	
WEST VIRGINIA[9]	X		State employees, including judicial investigation and hearing board members
WISCONSIN		X	
WYOMING[10]	X		Judges only

1. Arizona - The respondent adds: "If the State is a party to the action or the officers, including judges, are acting in official capacity, the State of Arizona has a form of insurance which pays the judgment on behalf of the state and the officials, including judges."

2. Colorado - see previous footnote 1 in question I.

3. Guam - The territory is authorized to pay for liability insurance for all governmental employees but none has been procured.

4. Illinois - Roy O. Gulley, Director of the AOC, reports: "Many of our state judges have begun to purchase professional liability insurance offered by the American Bar Association, Judicial Administration Division. Some of the judges are paying their own premiums, including each member of our Supreme Court. In some few counties in the state, individual judges have persuaded the County Board to pay the premium ... This has not been a wide-spread practice and I doubt seriously that there is any responsibility on the part of the unit of county government to pay the premium. Judges in our state are clearly state officers as opposed to county officers."

5. Maryland - Note, however, that the state does have a state insurance trust program, which has been utilized to pay §1988 attorney fee judgments against state officers. The respondent further states that he "is assured by those in charge of the program that any judgment against a judge for money damages or attorney fees will be paid (absent malicious conduct of the state officer)."

6. Michigan - Respondent notes that the Governor vetoed legislation that would have provided for judicial insurance at state expense.

7. New Mexico - But see question VI, footnote 5, which describes protection under state's Tort Claims Act.

8. North Carolina - N.C. Gen. Stats. §143B-422 et seq. establishes a Public Officers and Employees Liability Insurance Commission, which has authority to acquire insurance coverage in excess of the $100,000 protection under the State's Tort Claims Act. The respondent reports that the issue of whether the Judicial Department should obtain such additional protection is now under consideration.

9. West Virginia - Respondent indicates that judges have some coverage under a state policy for state employees. However, difficulty with insurance board,especially in getting specific answers to coverage questions, has lead to exploration of other avenues to protect judicial officers.

10. Wyoming - Insurance applies in cases arising beyond instances in which immunity exists (accident in state automobiles).

VI. Coverage under Liability Policies or Indemnification Statutes

Summary of Survey Responses

In response to what coverage is provided under their jurisdictions' liability policies or indemnification statutes, 22 respondents (40%) provided no information because their state has neither type of protection.

Sixteen states described the coverage under their jurisdictions' indemnification statutes. Of these, 8 (50%) indicated that the attorney fees of judges are included in the coverage. Plaintiffs' attorney fees are covered by seven (44%). Damages are included in 10 (63%) of these jurisdictions.

Fourteen respondents described the coverage under their insurance policies. Of these, 11 (79%) reported that the judges' attorney fees are included. Plaintiffs' attorney fees are covered by 10 (71%) of the policies, also. In 13 (93%) of these jurisdictions, damage awards are included in the coverage.

The respondents from Colorado, Georgia, and New Mexico indicated coverage both under an indemnification statute and an insurance policy. Judges' attorney fees and damage awards are covered in all three states. Colorado was uncertain about plaintiffs' attorney fees, but Georgia and New Mexico responded that they are covered.

All Responding Jurisdictions	Type of Protection	Coverage under Insurance Policy or Indemnification Statute					
		Judges' Attny. Fees		Plaintiff's Attny. Fees		Damages Awarded	
		Yes	No	Yes	No	Yes	No
ALABAMA	Insurance	X		X		X	
ALASKA		N/A, No policy or statute					
AMERICAN SAMOA		N/A, No policy or statute					
ARIZONA	Insurance	No info		No info		X	
ARKANSAS		N/A, No policy or statute					
CALIFORNIA[1]	Statutory	X		No info		X	
COLORADO	Statutory/ insurance	X		No info		X	
CONNECTICUT	Statutory	X		X		X	
DELAWARE	Statutory	X		No info		X	
DISTRICT OF COLUMBIA	Insurance	X		X		X	
FLORIDA		N/A, No policy or statute					
GEORGIA	Insurance and statutory	X		No information		X	
GUAM		N/A, No policy or statute					

All Responding Jurisdictions	Type of Protection	Coverage under Insurance Policy or Indemnification Statute					
		Judges' Attny. Fees		Plaintiff's Attny. Fees		Damages Awarded	
		Yes	No	Yes	No	Yes	No
HAWAII		N/A, No policy or statute					
IDAHO[2]	Insurance		X	X		X	
ILLINOIS	Statutory		X	X			X
INDIANA		N/A, No policy or statute					
IOWA	Statutory	X			X	X	
KANSAS		N/A, No policy or statute					
KENTUCKY		N/A, No policy or statute					
LOUISIANA		N/A, No policy or statute					
MAINE[3]	Statutory	No information					
MARYLAND[4]	State Insurance Trust Fund	X		X		X	
MASSACHUSETTS		N/A, No policy or statute					
MICHIGAN	Statutory		X	No information		No information	
MINNESOTA		N/A, No policy or statute					

All Responding Jurisdictions	Type of Protection	Coverage under Insurance Policy or Indemnification Statute					
		Judges' Attny. Fees		Plaintiff's Attny. Fees		Damages Awarded	
		Yes	No	Yes	No	Yes	No
MISSISSIPPI		N/A, No policy or statute					
MISSOURI[5]	Statutory	X		X		X	
MONTANA	State operated insurance plan	X		X		X	
NEBRASKA	Statutory	No information					
NEVADA		N/A, No policy or statute					
NEW HAMPSHIRE	Statutory	X		X		X	
NEW JERSEY		N/A, No policy or statute					
NEW MEXICO[6]	State Tort Claims Act and insurance policy	X		X		X	
NEW YORK	Statutory	No information		X		X	
NORTH CAROLINA	Statutory	X		X		X	
NORTH DAKOTA	Insurance	X		X		X	
OHIO		N/A, No policy or statute					

All Responding Jurisdictions	Type of Protection	Coverage under Insurance Policy or Indemnification Statute					
		Judges' Attny. Fees		Plaintiff's Attny. Fees		Damages Awarded	
		Yes	No	Yes	No	Yes	No
OKLAHOMA		N/A, No policy or statute					
OREGON	Tort Claims Act	No specific information/"all judgments" have been paid					
PENNSYLVANIA		N/A, No policy or statute					
PUERTO RICO	State insurance	No information					
RHODE ISLAND	Insurance	X		X		X	
SOUTH CAROLINA		N/A, No policy or statute					
SOUTH DAKOTA	Insurance	X		X		X	
TENNESSEE		N/A, No policy or statute					
TEXAS		N/A, No policy or statute					
UTAH	Statutory	X		X		X	
VERMONT	Statutory	No information		No information		X	
VIRGIN ISLANDS	Insurance	X			X	X	
VIRGINIA	Insurance	X		X		X	
WASHINGTON		N/A, No policy or statute					

All Responding Jurisdictions	Type of Protection	Coverage under Insurance Policy or Indemnification Statute					
		Judges' Attny. Fees		Plaintiff's Attny. Fees		Damages Awarded	
		Yes	No	Yes	No	Yes	No
WEST VIRGINIA	Insurance	X		Untested		X	
WISCONSIN	Statutory	No information; some question as to coverage of judiciary					
WYOMING	Insurance	X		X		X	

1. California - See, however, footnote 2 in question III.

2. Idaho - Chief Justice responds that following the Pulliam decision, he asked the Court Administrator to meet with the State Insurance Commissioner and Attorney General to review coverage for judges under state's blanket policy for state employees. Following this meeting, the insurance carrier agreed to amend policy to include coverage for Pulliam type of awards, at no additional costs, effective July 1, 1984.

3. Maine - The Maine Tort Claims Act appears to authorize a "governmental entity [to] . . . indemnify any employee against a claim which arises out of an act or omission occurring during the course or scope of his employment." The Chief Justice further explains that although authorized, the Judicial Department does not contemplate pushing for state-provided insurance.

4. Maryland - See footnote 4 in question V.

5. Missouri - Respondent replies that statute may cover plaintiff's attorneys under provision: "any claim or judgment."

6. New Mexico - Proposed insurance policy would cover all fees and damage awards. Also respondent adds that the State Tort Claims Act covers judges by providing that the state will pay for any damages recovered, including all attorney's fees.

VII. Activity with Regard to Judicial Insurance

Summary of Survey Responses

The responding jurisdictions were asked whether judges are beginning to negotiate for state-provided judicial insurance. Twenty-five jurisdictions (45%) responded affirmatively. Twenty-one respondents (38%) answered that this is not occurring in their jurisdictions. The remainder either responded that the state already bears the expense of insurance or that they had no information on this issue.

In regard to the purchase of insurance by individual judges at their own expense, 24 (44%) respondents indicated that their judges were beginning to purchase policies. Respondents in 23 jurisdictions (42%) reported that this is not ocurring. Many respondents, 8 or 15%, did not have information on this process.

All Responding Jurisdictions	Is your state negotiating for judicial insurance at state expense?		Are judges purchasing policies at their own expense?	
	Yes	No	Yes	No
ALABAMA	Already completed		X	
ALASKA		X, Not actively	Unknown	
AMERICAN SAMOA		X		X
ARIZONA		X		X
ARKANSAS	Unknown		X, Probably	

All Responding Jurisdictions	Is your state negotiating for judicial insurance at state expense?		Are judges purchasing policies at their own expense?	
	Yes	No	Yes	No
CALIFORNIA[1]	X, Preliminary negotiations underway		X	
COLORADO		X	X, Perhaps 1 or 2 out of 230	
CONNECTICUT[2]		X		X
DELAWARE[3]		X		X
DISTRICT OF COLUMBIA	N/A			X
FLORIDA	X			X
GEORGIA	X		No information	
GUAM	X, Under consideration			X
HAWAII	X			X
IDAHO	Have already done so		X	
ILLINOIS[4]	X		X	
INDIANA		X		X
IOWA		X	X	
KANSAS		X	X	

All Responding Jurisdictions	Is your state negotiating for judicial insurance at state expense?		Are judges purchasing policies at their own expense?	
	Yes	No	Yes	No
KENTUCKY[5]	X		X	
LOUISIANA		X	No information	
MAINE[6]		X	Unknown	
MARYLAND	X			X
MASSACHUSETTS	X		X	
MICHIGAN	X		X	
MINNESOTA[7]		X	X	
MISSISSIPPI		X	X, A few	
MISSOURI	X		X	
MONTANA	N/A			X
NEBRASKA	X		Unknown	
NEVADA		X	X	
NEW HAMPSHIRE		X	No information	
NEW JERSEY	X		Unknown	
NEW MEXICO	X		X	

All Responding Jurisdictions	Is your state negotiating for judicial insurance at state expense?		Are judges purchasing policies at their own expense?	
	Yes	No	Yes	No
NEW YORK		X	Unknown	
NORTH CAROLINA	X			X
NORTH DAKOTA	X			X
OHIO[9]	X		X	
OKLAHOMA		X		X
OREGON	X		X	
PENNSYLVANIA[10]	X			X
PUERTO RICO	X			X
RHODE ISLAND	N/A			X
SOUTH CAROLINA		X	X	
SOUTH DAKOTA	X			X
TENNESSEE		X		X
TEXAS	No information		X	
UTAH		X		X
VERMONT	X			X
VIRGIN ISLANDS	N/A			X

All Responding Jurisdictions	Is your state negotiating for judicial insurance at state expense?		Are judges purchasing policies at their own expense?	
	Yes	No	Yes	No
VIRGINIA	N/A		X	
WASHINGTON		X	X	
WEST VIRGINIA	X		X, Considering	
WISCONSIN	X		X	
WYOMING	X			X

1. California - The respondent, Ralph Gampell, Director, Judicial Council, concludes that the California indemnification statute makes the value of liability insurance questionable at this time.

2. Connecticut - The statutory protection does not apply to judicial discipline matters. The Connecticut Judges Association is exploring the feasibility of privately acquiring coverage limited to defense costs in judicial discipline proceedings.

3. Delaware - The judges would very much like to have the state provide insurance protection but they have not yet moved forward on that request because some protection exists under the current statutes.

4. Illinois - "The Supreme Court is going to seek appropriation in the next fiscal year to pay the premium for a blanket liability policy which would cover all of the judges in the state." Also see footnote 3 in question V for additional comments by Roy O. Gulley concerning individual and county supported purchase of the ABA professional liability policy.

5. Kentucky - Currently, individual insurance policy premiums are being paid for by individual judges. Next fiscal year, the state will bear this expense.

6. Maine - The Judicial Department is not seeking judicial insurance at state expense. It is unknown to what extent individual judges are purchasing insurance, although it is available in the state.

7. Minnesota - The respondent indicates that the judiciary is first trying for statutory indemnification and, if not successful will then seek state paid insurance.

8. New Jersey - The matter of judicial liability insurance is under study by Administrative Director of the Courts.

9. Ohio - Respondent notes that not all judges in the state agree on the wisdom of purchasing insurance - to make themselves target defendants.

10. Pennsylvania - Respondent reports a current attempt to secure coverage under state liability plan for judges, justices and support personnel, and for additional coverage to assure maximum protection.

VIII. Legal Defense of Judges

Summary of Survey Responses

Forty-five jurisdictions (82% of those responding) named the Attorney General as usually responsible for defending suits against judges.

In California, the county counsel defends trial judges and the Attorney General handles cases brought against the appellate bench. Similarly, the Attorney General in Washington defends Supreme Court justices, Court of Appeals judges and possibly Superior Court judges. Generally, the local prosecutor handles cases against Superior Court and District Court judges. Municipal Court judges are represented by their City Attorney. In Ohio, local prosecutors and city attorneys defend judges.

Also named in Colorado, Montana and West Virginia were counsel for the states' insurance carrier.

Court appointed or privately retained counsel were listed by California, Delaware, Michigan, Montana, Nevada, New Hampshire, Texas and the Virgin Islands.

Other agencies named were the Corporation Counsel in the District of Columbia, the Office of Risk Management in New Mexico, the Department of Justice in Delaware, and the judicial branch or Office of Court Administration in New York and Pennsylvania.

Only in Wyoming does the Attorney General provide representation and charge fees to the insurance carrier. Hawaii, Louisiana and South Carolina provided no information.

All Responding Jurisdictions	Who usually defends suits, other than disciplinary matters, against judges?	Does the Attorney General charge fees to the state or local insurance policy?	
		Yes	No
ALABAMA	Attorney General		X
ALASKA	Attorney General	N/A, no policy	
AMERICAN SAMOA	No one		
ARIZONA	Attorney General		
ARKANSAS	Attorney General	N/A, No policy	
CALIFORNIA	Trial Judges: County Counsel App. Judges: Attorney General Private Counsel (conflict)		
COLORADO	Attorney General or counsel for the state's insurance carrier		
CONNECTICUT[1]	Attorney General	N/A, No policy	
DELAWARE[2]	Attorney from Dept. of Justice or Ct. appt. private practitioner		
DISTRICT OF COLUMBIA	Corporation Counsel		X
FLORIDA	Attorney General	N/A, No policy	
GEORGIA	Attorney General		
GUAM[3]	Attorney General		

All Responding Jurisdictions	Who usually defends suits, other than disciplinary matters, against judges?	Does the Attorney General charge fees to the state or local insurance policy?	
		Yes	No
HAWAII	No information		
IDAHO	Attorney General		
ILLINOIS	Attorney General		
INDIANA	Attorney General	N/A	
IOWA	Attorney General		
KANSAS	Attorney General		
KENTUCKY	Attorney General		
LOUISIANA	No information		
MAINE	Attorney General	N/A	
MARYLAND	Attorney General		
MASSACHUSETTS	Attorney General	N/A	
MICHIGAN	Attorney General, often private attorneys		X
MINNESOTA	Attorney General		
MISSISSIPPI	Attorney General		

All Responding Jurisdictions	Who usually defends suits, other than disciplinary matters, against judges?	Does the Attorney General charge fees to the state or local insurance policy?	
		Yes	No
MISSOURI	Attorney General	Unsure, depending on policies	
MONTANA	Insurance Dept., Dept. of Administration; Attorney General; Selected private counsel		
NEBRASKA	Attorney General		
NEVADA	Attorney General: official action Private Counsel: unofficial action		
NEW HAMPSHIRE	Attorney General (or outside counsel retained by judge)		
NEW JERSEY	Attorney General		
NEW MEXICO	Attorney General and Risk Management Division		
NEW YORK	Attorney General or Counsel of Office of Court Adm.		
NORTH CAROLINA	Attorney General		
NORTH DAKOTA	Attorney General	Unsure	

All Responding Jurisdictions	Who usually defends suits, other than disciplinary matters, against judges?	Does the Attorney General charge fees to the state or local insurance policy?	
		Yes	No
OHIO	County prosecutors City Attnys. (Municipal Cts.)	N/A	
OKLAHOMA	Attorney General	N/A	
OREGON	Attorney General		
PENNSYLVANIA	Legal system funds costs of defense	N/A	
PUERTO RICO	Attorney General		
RHODE ISLAND	Attorney General	Issue has not arisen	
SOUTH CAROLINA	No information		
SOUTH DAKOTA	Attorney General		
TENNESSEE	Attorney General	N/A	
TEXAS	Attorney General, sometimes private counsel		
UTAH	Attorney General		
VERMONT	Attorney General	N/A	
VIRGIN ISLANDS	Policy covers attny. fees, each judge hires own attny.		X

All Responding Jurisdictions	Who usually defends suits, other than disciplinary matters, against judges?	Does the Attorney General charge fees to the state or local insurance policy?	
		Yes	No
VIRGINIA	Attorney General		
WASHINGTON	App. Ct. judges: Attorney General Dt./Superior Ct. judges: Attorney General or County Prosecutor Municipal Ct. judges: City Attorney	N/A	
WEST VIRGINIA	Attorney General or carrier's attorney	Doubtful, but not considered yet	
WISCONSIN	Attorney General		
WYOMING	Attorney General	X	

1. Connecticut - Normally, representation is provided by the Attorney General's Office at no charge. If the Attorney General refuses to provide representation and it is ultimately found that the judge acted in the discharge of his duties or in the scope of his employment and did not act wantonly, recklessly or maliciously, legal fees and costs will be reimbursed to the extent the Attorney General determines same to be reasonable.
2. Delaware - 10 Del. C. $3925
3. Guam - The territory, however, has no record of any judge being involved in any judicial proceeding.

Senator HATCH. Thank you both for coming. We appreciate the effort.

Judge DILLIN. Thank you, sir.

Senator HATCH. Our next two witnesses will be John W. Witt, the president of the National Institute of Municipal Law Officers, the city attorney of San Diego, CA; Mr. Larry Swift, executive director of the Washington State School Directors Association here in Washington, DC, representing the National School Boards Association.

We are happy to welcome both of you here today. Mr. Witt, we'll start with you.

STATEMENT OF A PANEL CONSISTING OF JOHN W. WITT, PRESIDENT, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AND CITY ATTORNEY OF SAN DIEGO, CA, ACCOMPANIED BY CHARLES S. RHYNE, GENERAL COUNSEL; AND LARRY SWIFT, EXECUTIVE DIRECTOR OF THE WASHINGTON STATE SCHOOL DIRECTORS ASSOCIATION, REPRESENTING THE NATIONAL SCHOOL BOARDS ASSOCIATION

Mr. WITT. Thank you very much, Senator Hatch and Senator Grassley. For the record, I will introduce myself. I am John W. Witt, the city attorney of the city of San Diego, presently the president of the National Institute of Municipal Law Officers. I am here with our organization's distinguished general counsel, Mr. Charles S. Rhyne.

I want to begin by saying that in supporting S. 1580 we, by no means, are criticizing the underlying fee-shifting purpose of section 1988; but I am criticizing the plaintiffs to whom awards too often are made, the amount of too many awards, and the basic unfairness to general taxpayers of too many awards caused by questionable applications of section 1988.

I will not dwell on the subject of the prevailing party, which is one that many of the witnesses before this subcommittee have dwelled on, I am sure. I will go, then, directly to the question of when the awards, whether or not a plaintiff clearly qualifies as a prevailing party, are too often excessive.

Although it is difficult to ascertain the amount of individual awards from reported opinions, too many horror stories can be found: cases in which six-figure awards are granted against state and local government. Such large awards tend to be punitive, whether they are intentionally so or not: punitive against local government taxpayers who quite rationally expect their tax dollars to go for public safety and other services vital to their day to day lives.

In other words, punishment of excessive awards is experienced by the taxpayer/voter for conduct of government officials and employees which, very often, is not very egregious in the first place involving legitimate differences of opinion on matters of less than crystal clarity. I will give you a personal experience.

On July 2, 1981, the U.S. Supreme Court handed down its confusing set of opinions in *Metromedia* v. *City of San Diego*. About the only thing that is clear about the *Metromedia* case is that the

Court ruled our off-premises sign control, or billboard ordinance, invalid because it violated the first amendment.

The case arose as a genuine controversy, however, that despite the *Metromedia* decision is not entirely settled today. Though the case arose in the California State courts and did not involve section 1983 and its related sections, the trial court decided section 1988 applied anyway and we were facing an attorneys' fees award of about $1 million.

Confident that the prestigious law firms representing the billboard industry would be able to substantiate the billable hours they were claiming, we settled the matter for $500,000.

Now, $500,000 is a sizable amount for any city, even one of the 10 largest in America, to have to pay out. It would be disastrous for a medium or small size city. Allow me to analyze that half million dollar award on the basis of the purpose of the Civil Rights Attorneys' Fees Act of 1976 in the first place.

That purpose is to remove financial barriers that would otherwise prevent access to the courts by disadvantaged plaintiffs acting in the role of private attorneys general to vindicate civil rights not for themselves alone, but also for the benefit of other similarly situated.

Who were the disadvantaged plaintiffs in our case? Metromedia, Inc. and Gannett, two of the largest media conglomerates in the country. Who were the other similarly situated? The rest of the well-financed billboard industry, that's who.

Who were the fees paid to? Two of the largest, wealthiest, most prestigious law firms in the Pacific Southwest.

Large fee awards tend to be symptomatic of an even larger problem: State and local government perceived to be a deep pocket from which large judgments can be gained topped by sizable attorneys' fee awards. No one can fault judgments which compensate individuals injured through the clear fault of a liable defendant.

Too often, however, fault is clearly marginal, and State and local government taxpayers are required to pay huge judgments, frequently with excessive attorneys' fees awards, in situations where judgment would have been granted in favor of an individual defendant of modest means.

In California, the combined effect of judicially legislated rules of comparative negligence and joint several liability have caused State and local governments to be named as defendants in cases in which the liability is highly speculative, indeed, in hopes that a finding of minimal fault will cause the government to absorb the entire judgment, including the major share of an uninsured or underinsured codefendant.

To make matters worse, California State courts have recently awarded judgments of $1.5 million and $6 million, respectively, against medium-sized beach communities on a theory which seams to boil down to the idea that beaches must be guarded 24 hours a day all year long to protect people from their own stupidity in swimming during unsafe surf conditions.

All this means is that local government, in particular, is finding it more and more difficult to guarantee its liability exposure. In many cases, liability insurance is simply unavailable at any premium or comes at an unaffordably high premium for most local government entities, few of which can self-insure with any level of confidence.

The combination of increased liability exposure and costs of litigation, of which attorneys' fees are a major factor, is in great measure responsible for a growing crisis of uncontrollable, unpredictable costs which local government cannot pass on to its citizen taxpayers other than through reduction of police, fire, and other public services of vital importance to the day to day life of the people in this country.

Unreasonably high attorneys' fees awards with other litigation costs have a chilling effect, I submit, on the decisionmaking process in local government. Local government officials will decline to make the kind of hard decisions that are really necessary to good government.

Finally, I believe that S. 1580 will not cause real violations of civil rights to go uncorrected, but it will make certain that attorneys' fees paid by State and local taxpayers under fee-shifting statutes will be reasonable and related to enforcement of legitimate rights in appropriate cases at procedurally proper timed.

I have here copies of a resolution passed earlier in the month on the NIMLO annual meeting in Philadelphia, which I would like to place in the record.

Senator HATCH. Without objection, we will put it in the record.

Mr. WITT. We will submit formal written remarks to Mr. Rader.

Senator HATCH. We will keep the record open.

Mr. WITT. Mr. Rhyne has suggested that the NIMLO organization will be able to make a survey of our 1,800 municipality members to find out just exactly, right now, what the impacts are of section 1988–P's on local government. We will submit that with the prepared statement, Senator.

Senator HATCH. Well, thank you so much. We will be happy to keep the record open for those documents; and, without objection, we will accept them into the record.

[Prepared statement, along with NIMLO survey and resolution, follow:]

PREPARED STATEMENT OF JOHN W. WITT

INTRODUCTION

On behalf of the approximately 1600 local governments comprising the membership of the National Institute of Municipal Law Officers (NIMLO), I thank the Committee for the opportunity to appear at these hearings so that the Committee can be aware of our reasons for supporting amendments to 42 U.S.C. Sections 1983 and 1988, such as those proposed in S.1580.

We reiterate the importance of reevaluating the uses to which the Civil Rights Act of 1871 and the Civil Rights Attorney's Fees Awards Act of 1976 (Acts) are being put, as was discussed by local government attorneys representing NIMLO before this Subcommittee during the 97th Congress.[1] The Supreme Court has indicated [2] that changes in the application of Section 1983 by the courts may only be accomplished in response to Congressional changes in the underlying legislation. The NIMLO membership believes that the Acts can be amended to restrict unwarranted and frivolous claims without discouraging the vigorous protection and enforcement of civil rights. Furthermore, we believe such amendments are necessary and vital to the public interest, especially with respect to taxpayers and legitimate victims of actual civil rights violations.

NIMLO is a nonprofit, nonpartisan fact-finding and fact-publishing organization with a membership of approximately 1650 local governments in all states. The organization was founded in 1935 by a group of city attorneys in order to fulfill a recognized need to collect and disseminate the varied legal experiences of American municipalities. The member local governments operate NIMLO through their chief legal officers, variously called city or county attorney, corporation counsel, city solicitor or law director, or other title. NIMLO serves as a clearinghouse of information pertaining to the legal aspects of municipal operations through research services and publications. In addition, NIMLO participates in judicial proceedings through the filing of amicus curiae briefs in cases of nationwide consequence to local governments that are before appellate courts.

It was in an amicus curiae role that NIMLO originally began to study the impact of §1983 litigation of local governments. While preparing an amicus curiae brief in a 1981 Supreme Court case,[3] NIMLO collected data om municipal experiences and pending damages claims in §1983 actions. Subsequently, the problems and experiences of our members relating to §1983 and §1988 have been a major topic of discussion at each of our twice-annual meetings. It is clear that while in the last few years there have been some successes in limiting the judicial parameters of §1983 and §1988 remedies, the cancerous growth of the number of §1983 claims being filed, spawned, largely, by attorneys anticipating nuisance value settlements that include fees, must be examined carefully by Congress. Recognition of the burdens imposed upon municipal taxpayers and the court dockets by the unintended use of these statutes, as a catch-all basis for federal jurisdiction and remedies whenever a party is unhappy with the actions of local governments or their employees, must not be impaired by allowing these amendments to be attacked politically on emotional grounds related to "civil rights" terminology. The problems of local governments under §1983 did not arise out of a legislative decision to impose such broad liability upon these governments, but out of a 1978 judicial interpretation of legislation adopted over a century earlier.[4] Now, due, apparently, in part to individual political considerations, local governments are being victimized by legislative reluctance to clarify the true intent of the 1871 Act.

As officials who feel great personal and professional responsibility to the public--and our own families and friends, we are committed to implementing the laws that protect this country's citizens and residents. And while there often may be differences of opinion among politicians, administrators and lawyers as to the best policy approach that would advance governmental and human rights goals, the members of NIMLO are convinced that §1983 and §1988, as they are now interpreted and applied, are doing great harm to all races, religions, ages and other specially protected groups in this country. The harm is the same kind that works against nonprotected groups, that is, substantial interference with the usual operation and financing of governmental activities.

However, there also may be validity to an argument that, currently, §1983 and §1988 are subjugating the very concerns which they were originally intended to advance. Protection of rights has become secondary to the collection of attorneys' fees; instances of actual violation of federally ensured rights, about which governmental officials and employees should be made keenly aware, are lost in a mass of frivolous or unnecessary lawsuits that are creatively pleaded under §1983 against local governments and their agents. Once filed, local governments may either defend these suits, usually in federal courts, or settle them. Because of the profusion of such actions; the available staff, whose numbers often are limited by common governmental budget constraints; and the cost of litigating in and travelling to federal courts, many of these suits may be settled for a nuisance value.

I. THE CURRENT STATE OF CIVIL RIGHTS ENFORCEMENT AGAINST LOCAL GOVERNMENT: THE NEED FOR AMENDMENT

The results of NIMLO's surveys of our members' experiences with §1983 and §1988 actions continue to confirm burdensome common problems. Instead of repeating the judicial development of §1983 and §1988 about which my colleagues had testified before this Subcommittee in the previous term of Congress,[5] I will incorporate by reference the text of their prepared statements (omitting attachments and exhibits) into my prepared statement, [6] and ask the Committee to receive them into the hearing record. These earlier statements do a thorough job of presenting the development of municipal liability pursuant to §1983 and §1988, explaining the problems faced by local governments as a result of this liability, and examining amendatory legislative proposals supported by our members.

I also ask the Committee to receive into the record two reports and one legal analysis, which are attached. The first, entitled "Report on Proposed Legislation to Amend the Civil Rights Act of 1871 (42 U.S.C. Sections 1983 and 1988 [sic])," [7] was presented by the NIMLO Committee on Revision of Civil Rights Acts, U.S. Code Sections 1983 and 1988 (Title 42), in November 1982 at our Annual Fall Conference. Attached to that report is a brief compilation of landmark decisions and the most significant recent cases brought under §§1983 and 1988. Both the status of proposed legislation and compilation of significant recent cases are updated in the second attached report, entitled "Report of the Committee on Revision of U.S. Code Sections 1983 and 1988 (Title 42)." [8] This second report was presented by T. Emmet Walsh, City Attorney of Spartanburg, South Carolina, and Chairperson of our Committee studying revisions to §§1983 and 1988, at our most recent annual Conference, in August 1983. The attached legal anaylsis prepared by two Assistant Corporation Counsels of Chicago, Illinois, a NIMLO Member, has recently been published. The Article, "Attorney's Fees Under the Civil Rights Act - A Time for Change", by Robert W. Fioretti and James J. Convery, can be found in 16 John Marshall Law Review 261 (Spring 1983). [9]

These attachments detail the legal background and bases for NIMLO's assertion of a need to amend §1983 and §1988. The arguments and concerns espoused in these attachments are largely valid even now. Recent actions by the Supreme Court have simplified the qualified immunity test,[10] limited the authority of the judiciary to fashion broad equitable remedies under §1983,[11] applied a functional test to immunity analysis,[12] and considered the extent of a plaintiff's success on an underlying civil rights cause of action as a crucial factor in a §1988 attorney's fee award.[13] These decisions will provide some relief to local governments defending §1983 and §1988 claims, but they fall far short of providing all of the necessary, and warranted, relief. For example, these decisions do not actually circumscribe a plaintiff's ability to state a prima facie §1983 case; i.e., a plaintiff can get into court even though the nature of the alleged violation is very unclear. Thus, once stated, an esoteric §1983 claim must be researched, answered and litigated by the municipal defendant, even though merely to establish sufficient facts upon which a court could find summary dismissal to be appropriate. Furthermore, while the standards utilized in awarding §1988 fees to plaintiffs may be clearer and more uniform as a result of the recent Supreme Court action in Hensley,[14] as a practical matter, the litigation of fees can become very complex.

A detailed review of each hour claimed to have been spent working on a civil rights-related claim could involve extensive investigation and thorough questioning.[15/]

Furthermore, the Supreme Court, in other recent decisions, has declined to find a preference for state administrative remedies over §1983 federal court claims,[16/] and to require a showing of evil motive or intent before permitting punitive damages to be assessed against individuals who are §1983 defendants.[17/] Yet, the availability of administrative remedies does preclude suits against federal government employees named as defendants in employment-related Bivens actions[18/] which provide judicial remedies for federal government activities similar to statutory remedies provided by §1983 for state and local government activities.

II. THE CURRENT STATE OF CIVIL RIGHTS ENFORCEMENT AGAINST LOCAL GOVERNMENT: REPORTED EXPERIENCES

As our national legislators, the members of this Subcommittee, and Congress, generally, should be familiar with the development of local government liability under 42 U.S.C. §§1983 and 1988. However, knowledge of the legal background of this liability, as of any other subject, may engender, if not stifled yawns, only the scientific concern of a detached observer. My main goal today is to personalize the problems presented by §§1983 and 1988, i.e., to make it more difficult to remain detached from these problems. And the problems are personal, to you, to me and to every taxpayer and every resident of this country concerned with the protection of legitimate civil rights.

The most effective method I have available to me to demonstrate the universal impact of these provisions is to report some of the results and comments from an April survey of our members on their experiences with §1983 and §1988 claims. It is difficult to develop complete information on §1983 and §1988 claims filed against local governments, since their files may not be indexed to indicate all jurisdictional grounds involved in each case. As would be expected, and as our results demonstrate, the largest cities would find it especially prohibitive to attempt a listing of §1983 and §1988 claims filed against them. But, while the statistics developed from the responses received by NIMLO may therefore be skewed, they are sufficiently representative to be of value in understanding the realities of §1983 and §1988 litigation.

Some additional explanation is also necessary before specifics of our survey responses should be reported. First, the reported amounts for damage claims pending against the responding members do not include attorneys' fees claims, costs of implementing any equitable relief requested, or court costs. Second, the responses may not include §1983 and §1988 claims filed against local government officers or employees where the governmental entity itself is not a named defendant; while most responses do include claims pending against indemnified agents of the governmental entity, it is possible that a particular government's potential liability is actually greater than stated in its response. Finally, as quickly becomes apparent in reviewing individual lawsuits, the amount of damages claimed is often greatly overstated in relation to the alleged injury. However, even though an objective analysis of the damages that may ultimately be assessed against a local government might be much less than the damage claims specified in pending §1983 and §1988 actions, this disproportion, itself, can present difficulties in developing an operating budget for the local government.

Despite the limitations and caveats on the responses to the NIMLO survey, I believe that the results reflect the reality of litigation under §1983 and §1988 against local government nationwide. Because the responses and figures that I will now discuss with particularity may be better understood if the format of the survey is known, I am attaching, as Exhibit 1, a copy of the April 12, 1983 letter to NIMLO members requesting information on their §1983 and §1988 litigation. A summary of the compiled results, with a state-by-state breakdown of claims pending against the 220 responding jurisdictions, is attached as Exhibit 2.

Briefly, of the 220 jurisdictions represented in responses to the NIMLO survey, the total number of pending claims reported was 1,185, so the average number of pending claims per jurisdiction is 5.4. Of these, 891 claims specified amounts for damages sought.

The total amount of damages specified in pending claims reported in the responses was $3,382,703,166; therefore, the average claim in which damages were specified was for $3,796,524. If these results were extrapolated over the 1650 NIMLO members, there would be approximately 8,910 §1983 claims pending against these members, with a total of over $25.4 billion damages specified. Carrying the extrapolation even further, the approximately 39,000 counties, municipalities and townships in this country would be facing 210,600 pending §1983 claims, with specified damages totalling $601.3 billion. And, again, the costs of equitable relief, defense expenses, potential liability for plaintiffs' attorneys' fees, and court costs are not included in these calculations.

While, because of their length and repetitive nature, I have decided not to attach copies of every response received, all of the responses to which I will refer, as well as a sampling of other representative responses, are attached to this statement as Exhibits 3- 53.[19] However, should this Subcommittee so request, NIMLO will be happy to provide it with copies of every response, including any received subsequent to the submission of this prepared statement.

The response of Tucson, Arizona,[20] affords an excellent statistical overview of one city's experience with §1983 and §1988 matters. Tucson reports that in lawsuits filed against it over the past six years, approximately one in four contains a §1983 allegation. Of the 57% of these suits that have been closed, approximately 18% were settled, 15% were lost in litigation, and 67% were won in litigation. The city estimates that, of its total dollar outlay to date, 16% was spent for settlements, 15% for judgments, and 69% for defense costs. Therefore, while Tucson has experienced a high rate of success in §1983 litigation, it has been burdened with significant defense costs.

Several other responses can be cited to indicate probable high costs associated with defending against §1983 claims, and the liability exposure that necessitates a serious defense to such claims. Among other §1983 cases, Los Angeles County[21] has 231 civil rights cases pending against its sheriff for false arrest, false imprisonment, assault and battery and similar causes of action, which are very common kinds of §1983 suits. Cincinnati, Ohio,[22] has, among other §§1983 and 1988 cases, 76 pending discrimination claims. The large number of pending claims and concomitant damages liability are also very evident in the responses from Albuquerque, New Mexico;[23] Canton, Ohio;[24] and Memphis, Tennessee.[25] For example, Canton reports a total demand of $559.7 million in damages for 8 pending §1983 cases.

Before continuing to illustrate the monetary impact and other common observations regarding municipal liability under §§1983 and 1988, another very important and fundamentally distressful potential result should be acknowledged. This possibility may be characterized as a chilling effect on the public's willingness to serve or be employed by local governments, and can be anticipated whenever the responses indicate that an action is being brought against individuals acting under color of law.[26] It is not unusual for officers and employees to be indemnified by the governmental entity against awards of compensatory damages, but not awards of punitive damages. And, while preventing violations of individual rights by public employees would appear to be a laudable goal, as a practical matter, employees run a high risk of being named as defendants in §1983 suits whenever they take some action that affects anyone adversely. Because governance implies making decisions for the greater good, often at the expense of some person or persons, the threat of being sued has become a fact of life in public service on the local level. As a result, qualified persons may be discouraged from public service; furthermore, arguably, the deterrence purpose of §1983 and §1988 remedies may suffer from the overbreadth of these provisions, as they are currently applied. The response of Bristol Township, Pennsylvania,[27] hints at the chilling effect that §§1983 and 1988 may have on the actions of governing bodies, but the South Orange Village, New Jersey,[28] response explicitly bemoans this chilling effect.

A number of the survey responses indicate that the problems of local governments with misdirected civil rights claims are largely attributable to §1988 and the attitude of the federal courts. Several responses cited the opportunity to get plaintiffs' attorneys' fees under §1988, together with very small risk of having to pay defendants' legal expenses, as encouragement of §1983 suits.[29] At least two of the responses, Lincoln, Nebraska,[30] and Kent, Ohio,[31] report that this fees motivation was admitted by plaintiffs' attorneys in suits involving those jurisdictions. In part, the §1988 fees motive is perceived as propogated by the willingness of courts to award attorneys' fees to plaintiffs.[32]

Similarly, the generally pro-plaintiff attitude of federal courts is blamed by some survey respondents as contributing to the flood of §1983 suits filed against local governments in federal courts.[33] Federal court leniency regarding the filing of §1983 claims sometimes carries over to granting such plaintiffs numerous chances to amend insufficient complaints,[34] thereby increasing local government costs and frustrations in litigating these claims. Kent, Ohio, [35] has found its costs of litigation in federal court to be approximately four times the cost of litigating similar cases in state courts. Plaintiffs in a suit against Kent have admitted that they believed that the added expense of federal court litigation would force the city to make a settlement offer. The representative of two other jurisdictions, North Hills and Great Neck Estates, New York,[36] has expressed concern that the threat of expensive federal court litigation may be used by §1983 plaintiffs to induce local governments to accede to the desires of the plaintiffs regarding development rights. [37]

Again, however, the monetary costs of nuisance settlements, which -- as becomes apparent in reviewing the responses -- are very common, are an insufficient indication of the scope of this problem. Settlements forced by the oppressive nature of §1988 can be very demoralizing to defendant public servants and their families who believe, perhaps naively, in the certainty of vindication through judicial process. Where a §1983 claim involves sensationalistic allegations, as is often the situation in suits against police officers, media coverage of the lawsuit can focus a great deal of attention on the involved individuals. Settlements in these cases may be explained publicly as good business judgment, with the anticipated costs of litigating exceeding the cost of settling. However, I suspect that we are all realistic enough to acknowledge that the public servant whose actions triggered the suit may continue to be subject to lingering doubts, or a perception of such doubts, about the motivation to those actions.

Some examples from the survey responses of the direct taxpayer costs of defending §1983 and §1988 claims pointedly illustrate the reason that settlements may be preferred over litigation despite policy considerations that would counsel against negotiated resolutions. Chattanooga, Tennessee,[38/] reports that in one recent case, the city spent over $30,000 to defend in federal court a §1983 claim against police officers that may have cost less than one-half that amount in state court. Huntsville, Texas (population 25,000),[39/] incurred approximately $80,000 of expenses in the successful defense of a recent §1983 case in which the court found that the plaintiff had acted in bad faith regarding the presentation of personnel grievances to the city. The city's request for attorneys' fees in this case is pending, but the court has also noted that exhaustion of administrative remedies is not a prerequisite to §1983 cases. Tacoma, Washington,[40/] reports having spent approximately $105,000 in defense costs for four §1983 cases handled by outside counsel.

Even a single §1983 or §1988 case can create great difficulties for small local governments. McEwen, Tennessee,[41/] reports that, in addition to substantial legal fees, an award of the $150,000 damages sought in one case pending against that city would necessitate an 83% increase in real and personal property taxes. In the same response, Lobelville, Tennessee,[42/] reports that for two pending §1983 cases involving a city police officer, the litigation costs are expected to be far out of proportion to the total city budget. Similarly, Mustang, Oklahoma, [43/] a city of 10,000 people, incurred legal expenses in excess of $5,000 in its successful defense of a §1983 case that was admitted to be political and maintained, primarily, for attorneys' fees purposes. Considering its limited budget, Mustang is concerned that potential liability for §1988 fees and the cost of litigating civil rights claims will force small municipalities to avoid these costs by paying needed budget dollars for settlements. Another city of approximately this same size, Cambridge, Maryland,[44] is currently being sued for $25 million in one §1983 case.

In addition to effecting tax rates directly,[45] assessing awards under §§1983 and 1988 against local governments could result in layoffs of important personnel, such as police officers and firefighters.[46] The problem becomes even more acute where, as was the situation described in several responses, the local government's insurance carrier denies liability for the expenses of these suits[47] or the government does not have insurance coverage for these causes of action.[48]

A major criticism of §§1983 and 1988, as they are currently interpreted, is that they allow so many frivolous suits to be filed.[49] Local governments are having to defend a myriad of actions brought under the guise of §1983, even though the bases for the actions may not be clearly articulated in the plaintiffs' pleadings.[50] Investigating and answering such vague claims can involve considerable and, especially for small municipalities, inordinate amounts of work.[51] In this regard, at least one survey respondent expressly refers to the problem of §1983 suits being brought against local governments and police officers by prisoners who have nothing better to do.[52] In fact, the recent Supreme Court decision in Prosise v. Haring[53] may provide some incentive to prisoners to file even more §1983 suits.

The subject matter of §1983 suits can range from the typical police activities, zoning actions, licensing decisions and prison conditions claims to more eye-catching matters, such as the allegedly unconstitutional destruction of animals.[54] Once recent §1983 case had to be appealed to a federal court of appeals before the conclusion was reached that a county has no constitutional obligation to construct a bridge over a ford.[55] Ames, Iowa,[56] reported that it was required to defend a §1983 suit brought by a college student who claimed that having to return stolen firewood to the place from where it was taken constituted penal servitude in violation of the Thirteenth Amendment.

One of the most galling of the §1983 suits found in the responses to the NIMLO survey was reported by Livonia, Michigan.[57/] The plaintiff in the Livonia action had been placed in the city jail, intended to be essentially an overnight lockup, as a result of a court order that had found overcrowded conditions in a facility in another jurisdiction. After being convicted of a felony and incarcerated in a state prison, the plaintiff filed his §1983 suit against the city, complaining of receiving improper food and being refused a pencil and paper in the city jail. Not only was counsel appointed, but, ultimately, the city had to pay nondefense expenses of over $68,000, including $23,500 in punitive damages and $19,500 in attorneys' fees.

An interesting case involving an award of attorneys' fees was also reported by Crystal Lake, Illinois.[58/] There a developer had brought a §1983 suit against the city for failure to approve a plan for development. The project of concern to the developer involved HUD Section 8 housing subsidies. Although the federal district court found no economic discrimination, no intentional discrimination and no intent to discriminate, it ruled that the refusal fell within the Fair Housing Act in that it could tend to discriminate against certain unnamed parties. Monetary damages were denied, but the court awarded $68,000 in attorneys' fees and over $18,000 in costs to the plaintiff.

CONCLUSION

Once again, I emphasize that NIMLO and its members do not oppose the vigorous enforcement of legitimate civil rights; we do not wish to inhibit the right of truly aggrieved victims to redress violations of their civil rights. We do oppose the application of §1983 to cases having nothing to do with civil rights, and the denial to local governments of the same defenses available, through a careful balancing of interests, to their officers and employees. We believe that judicial interpretations of the underlying congressional intent of the Civil Rights Acts of 1871, and the application of the Civil Rights Attorney's Fees Awards Act of 1976, have resulted in excessive and unintended judicial interference with state and local operations and federal targeting of state and local monetary and personnel resources.[59/]

NIMLO would support amendments to 42 U.S.C. §§1983 and 1988 that would limit the availability of the remedies furnished thereby to violations of rights protected by the federal constitution or statutes providing for equal rights; recognize that governmental defendants should be accorded the same immunities that are available to their officers and employees; [60/] discourage nonmeritorious suits; provide definite support for the recovery of defendants' attorneys' fees in some cases; and prohibit the use of multipliers in and clarify the computation of fees to be awarded.

Because S. 1580 would go a long way toward easing the unfair burdens currently placed on local governments and their taxpayers as a result of §§ 1983 and 1988, NIMLO believes its members would support these bills. However, we also suggest any amendatory legislation that is adopted should expressly apply to all pending, as well as subsequent, § 1983 and § 1988 cases.

Thank you.

FOOTNOTES

1/ See, Municipal Liability Under 42 U.S.C. 1983: Hearings on S.584, S.585 and S.990 Before the Subcommittee on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 72-326 (1981); Id., unpublished statement of James B. Brennan, City Attorney of Milwaukee, Wisconsin (March 1, 1982). The prepared remarks of these representatives are incorporated by reference herein as Attachments A and B; see infra note 6 and accompanying text.

2/ Monell v. Dept. of Social Services, 436 U.S. 658, 695 (1978); Maine v. Thiboutot, 448 U.S. 1,8 (1980).

3/ City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

4/ Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

5/ See supra note 1 and accompanying text.

6/ These prepared statements are labbeled as Attachments A & B, herein.

7/ Attachment C, herein

8/ Attachment D, herein.

9/ Attachment E, herein.

10/ Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982).

11/ City of Los Angeles v. Lyons, 103 S.Ct. 1660 (1983).

12/ Briscoe v. LaHue, 103 S.Ct. 1108 (1983).

13/ Hensley v. Eckerhart, 103 S.Ct. 1933 (1983).

[14] Id.

[15] For example, where a plaintiff's attorney specializes in one kind of civil rights litigation, fees awarded against one defendant may actually subsidize another plaintiff's case or result in a multiple payment of fees for the same hour of work. It is easy to foresee how a plaintiff's attorney could make a claim for the same research time in more than one case of a similar nature; yet it would be very difficult for defendants to detect and defend against such a practice.

[16] Patsy v. Board of Regents, 102 S.Ct. 2557 (1982). Similarly, there is no preference indicated for state judicial remedies. Monroe v. Pape, 365 U.S. 167 (1961). These decisions are also relevant in the context of §1988 fees. Since at least one federal appellate court has indicated that §1988 fees are not available for administrative proceedings, Latino Project, Inc. v. City of Camden, 701 F.2d 262 (3d Cir. 1983), complainants may be urged to file suit in federal court before pursuing administrative solutions. A local government which then agrees that the problem brought to its attention should be remedied may be in the position, in relation to §1988 fees, of the court presuming that the local government, but for the lawsuit, would have been unresponsive to the problem. Obviously, this presumption is unfair and rewards inefficiency.

[17] Smith v. Wade, 103 S.Ct. 1625 (1983).

[18] Bush v. Lucas, 103 S.Ct. 2404 (1983), in which a unanimous Court declined to create a new judicial remedy where not expressly authorized by Congress, because federal personnel policy provides a scheme of meaningful remedies. In its opinion in Bush, the Court states:

> The costs associated with the review of disciplinary decisions are already significant - not only in monetary terms, but also in the time and energy of managerial personnel who must defend their decisions. The Government argues that supervisory personnel are already more hesitant than they should be in administering discipline, because the review that ensues inevitably makes the performance of their regular duties more difficult. Brief for the United States 37-41. Whether or not this assessment is accurate, it is quite probable that if management personnel face the added risk of personal liability for decisions that they believe to be a correct response to improper criticism of the agency, they would be deterred from imposing discipline in future cases....

Id. at 4758.

[19] For purposes of easy reference, the responses are organized alphabetically, by state and, within each state, according to the first jurisdiction named within each response.

[20] Exhibit 4.

[21] Exhibit 5.

[22] Exhibit 31.

[23] Exhibit 24.

[24] Exhibit 30.

[25] Exhibit 47.

[26] A prayer for punitive damages usually indicates the inclusion of individual defendants, since, under City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), punitive damages are not available against local governments.

[27] Exhibit 40.

28/ Exhibit 23.

29/ *See* response of Winston-Salem, North Carolina (Exhibit 29). *See also* responses of Tuscaloosa, Alabama (Exhibit 3); Tucson, Arizona (Exhibit 4); Rochester, Minnesota (Exhibit 19); and Tacoma, Washington (Exhibit 56).

30/ Exhibit 20.

31/ Exhibit 32.

32/ *See* responses of Rochester, Minnesota (Exhibit 19); and Bristol Township, Pennsylvania (Exhibit 40).

33/ *See* responses of Newport, Oregon (Exhibit 38); and Watseka, Illinois (Exhibit 14).

34/ *See* responses of Broken Arrow, Oklahoma (Exhibit 35); Crystal Lake, Illinois (Exhibit 11); Rye, New York (Exhibit 26); and Suffern, New York (Exhibit 27).

35/ Exhibit 32.

36/ Exhibit 25.

37/ The efficacy of such a threat against these two jurisdictions is more disturbing where considered in light of their populations, 2,300 and 3,000, respectively.

38/ Exhibit 46.

39/ Exhibit 53

40/ Exhibit 56. One of these cases was dismissed on motions and two others resulted in jury verdicts for the city. The fourth case was settled.

41/ Exhibit 49.

42/ *Id.*

43/ Exhibit 37.

44/ Exhibit 17.

45/ *See* response of East Greenwich, Rhode Island (Exhibit 41).

46/ *See* response of Hoffman Estates, Illinois (Exhibit 12).

47/ *See* responses of Delta, Colorado (Exhibit 7); and Fort Pierce, Florida (Exhibit 8).

48/ *See* responses of Suffern, New York (Exhibit 27); and Lobelville, Tennessee (Exhibit 49).

49/ *See* responses of Tuscaloosa, Alabama (Exhibit 3); and Winston-Salem, North Carolina (Exhibit 29).

50/ *See* response of Greenville, South Carolina (Exhibit 43).

51/ *See* response of Suffern, New York (Exhibit 27).

52/ *See* response of Watertown, South Dakota (Exhibit 45).

53/ 103 S.Ct. 2369 (1983), in which the Court permitted the bringing of a §1983 claim based on an alleged illegal search and seizure despite plaintiff's having pleaded guilty to a resultant criminal charge.

54/ *See* responses of Sandusky, Ohio (Exhibit 33); and Baltimore, Maryland (Exhibit 16).

55/ Dollar v. Haralson County, 704 F.2d 1540 (11th Cir. 1983).

56/ Exhibit 15.

57/ Exhibit 18.

58/ Exhibit 11.

59/ These concerns and motivations are echoed in the conclusion of the article by Fioretti and Convery, supra note 9, at 6-7, which is incorporated into these prepared remarks as Attachment E:

> "The various proposals put forth are not intended to discourage or inhibit the rights of the truly aggrieved. Rather, the intent of this article is to return the focus of civil rights litigation to the aggrieved party, away from the fee considerations which have become the catalyst and incentive in bringing numerous and often frivolous claims. One who violates another's civil rights should properly be burdened with having to pay attorney's fees necessary to prove such a claim. However, the amounts of fees being awarded and the nature of the underlying claims must be viewed in light of the goals of the original legislation.
>
> Congress clearly did not intend the extreme financial burdens now being placed on units of local government. Nor did Congress intend to water down the value of traditional civil rights by awarding attorney's fees in litigation involving what are, in essence, tort claims disguised in civil rights clothing. Both the courts and Congress must take a second look at the Attorney's Fees Awards Act of 1976, and its implementation, in order to more equitably protect those whose civil rights have been violated."

Id. at 286.

60/ The survey response of Winter Park Florida (Exhibit 10), explains that city's reason for supporting the extension of immunity: "The City of Winter Park is very much in favor of the passage of Senate Bill 1580 not only because of its experience in the above case, but also because the United States Supreme Court by its decision in Owen v. City of Independence, Missouri, supra, has stated that all municipalities and all municipal taxpayers should be monetarily punished for failing to foresee how the federal judiciary might interpret the constitution in the future. I am sure our City, and all other cities, would have no problem in paying those damages which a plaintiff might incur as a result of the City's violation of some clearly established constitutional right that the municipal officers involved either knew or should have known. However, to require our City and other cities to formulate personnel decisions and other municipal decisions by use of some crystal ball or Ouija board to try to determine how the federal judiciary might rewrite the constitution next is simply to put an unfair burden on municipal officials and municipal taxpayers."

RESULTS OF §1983 SURVEY BY NIMLO

	Number of §1983 cases filed since 1980	Total amount of damages claimed against municipality	Total amount of damages paid by municipality
ALABAMA			
Tuscaloosa	100+	$ 70,000,000	$ 100,000
ARIZONA			
Paradise Valley	1	N/A	$ 15,000
ARKANSAS			
Little Rock Wastewater Utility	2	$ 50,000	$ 0
North Little Rock	10	$ 7,400,000	$ 0
CALIFORNIA			
Escondido	5	N/A	N/A
Huntington Beach	26	$ 17,775,000	$ 52,500
Roseville	6	$ 15,000,000	$ 55,000
Santa Barbara	16	N/A	$ 80,000
South San Francisco	3	$ 1,000,000+	$ 75,000
Torrance	10	N/A	$ 6,500
Watsonville *a	1	$ 1,000,000	$ 0
COLORADO			
Aurora *b	23	$ 31,498,000	$ 17,500
Colorado Springs	N/A	$ 30,950,000	$ 117,500
Greenwood Village	3	$251,311,000	$ 0
CONNECTICUT			
Norwalk	10	$ 8,400,000	$ 24,000
Vernon	1	N/A	$ 0

	Number of §1983 cases filed since 1980	Total amount of damages claimed against municipality	Total amount of damages paid by municipality
FLORIDA			
Daytona Beach *c	13	$ 2,570,000	$ 7,000
Deland *c	3	$ 2,000,000	$ 75,000
Delray Beach	8	$ 750,000	$ 150,000
Fort Lauderdale	17	$ 7,035,000	$ 25,000
Homestead	0	$ 0	$ 0
Pensacola *b	7	$ 4,750,000	$1,500,000
GEORGIA			
Columbia-Muscogee County	N/A	N/A	$ 0
IDAHO			
Moscow	1	$ 300,000	$ 0
ILLINOIS			
Libertyville	2	$100,000,000	$ 0
Springfield	19	N/A	$ 30,354
Urbana	N/A	N/A	N/A
IOWA			
Sioux City	N/A	$ 6,953,500	$ 2,500
KANSAS			
Fort Scott	1	$ 59,500,000	$ 0
Hutchinson	3	$ 1,380,000	$ 0
MAINE			
Bangor	2	$ 0	$ 0
Lewiston	1	$ 3,000,000	$ 0

	Number of §1983 cases filed since 1980	Total amount of damages claimed against municipality	Total amount of damages paid by municipality
MARYLAND			
Baltimore	32	$ 62,932,000	$ 47,000
Cambridge	4	$ 1,000,000	$ 20,000
Easton	3	$ 4,400,000	$ 62,000
MICHIGAN			
Grand Rapids	18	$230,000,000	$ 0
North Muskegon	1	N/A	$ 46,000
MINNESOTA			
Columbia Heights	0	$ 0	$ 0
Rochester	0	$ 0	$ 0
St. Paul	12	$ 50,000+	$ 2,900
MISSOURI			
Liberty	0	$ 0	$ 0
Springfield *d	N/A	$ 15,275,000	$ 37,000
MONTANA			
Bozeman	3	$ 3,000,000	$ 0
NEW JERSEY			
East Rutherford	4	N/A	$ 0
Mantoloking	0	$ 0	$ 0
NEW YORK			
Rye	1	$ 1,000,000	$ 0
NEVADA			
Las Vegas	0	$ 0	$ 0

	Number of §1983 cases filed since 1980	Total amount of damages claimed against municipality	Total amount of damages paid by municipality
NORTH CAROLINA			
Carrboro	0	$ 0	$ 0
Charlotte	41	N/A	N/A
NORTH DAKOTA			
Wahpeton	0	$ 0	$ 0
Williston	1	$ 125,000	$ 8,500
OHIO			
Springfield	4	$ 5,355,523	$ 44,600
Steubenville	6	$ 12,000,000	$ 150,000
OKLAHOMA			
Broken Arrow *e	10	$ 7,158,651	$ 15,000
Midwest City	15	$ 132,880,884	$ 13,000
Oklahoma City	42	$ 125,863,234	$ 273,247
OREGON			
Beaverton	6	$ 500,000	$ 0
Corvallis	14	$ 26,530,000	$ 87,000
Milwaukie	0	$ 0	$ 0
Pendleton	0	$ 0	$ 0
Portland	N/A	$ 69,111,479	$ 795,482
RHODE ISLAND			
Newport	N/A	N/A	N/A
SOUTH CAROLINA			
Columbia	11	$ 11,750,000	$ 1,000
Greenville	10	$ 15,000,000	$ 700
SOUTH DAKOTA			
Pierre	1	$ 20,000	N/A

	Number of §1983 cases filed since 1980	Total amount of damages claimed against municipality	Total amount of damages paid by municipality
TENNESSEE			
Waverly	N/A	$ 3,135,000	$ 37,500
TEXAS			
Abilene	9	$ 9,941,000	$ 125,000
College Station	3	$ 4,979,556	N/A
Fort Worth	39	$ 26,711,434	$ 9,500
Huntsville	5	$ 2,560,000	$ 0
Texarkana	6	$ 67,000,000	$ 0
Tyler	30	$ 35,000,000	$ 0
UTAH			
Murray City	1	$ 10,000	$ 2,000
Park City	3	$ 10,150,000	$ 2,300
Salt Lake City	70	$2,892,343,248	$ 27,799
South Salt Lake City	5	$ 20,000,000	$ 35,000
Springville	2	$ 1,400,000	$ 0
VIRGINIA			
Altavista	0	$ 0	$ 0
Danville	N/A	N/A	N/A
Roanoke *f	9	$ 111,050,000	$ 10,000
WASHINGTON			
Renton	10	$ 22,500,000	$ 27,500
Vancouver	15	N/A	$ 20,000+
WISCONSIN			
Hartland	0	$ 0	$ 0
Sheboygan	10	$ 193,000,000	$ 2,500
West Bend	1	$ 40,000	$ 0
WYOMING			
Evanston	1	N/A	$ 5,000

N/A -- figures unavailable
*a -- 1985 figures only
*b -- figures since 1981
*c -- figures since 1982
*d -- figures since July 1982
*e -- figures since July 1981
*f -- figures since 1984

RESOLUTION OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS RE: AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1871 AND THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

WHEREAS, Section 1983 (42 U.S.C. §1983), as originated in the Civil Rights Act of April 20, 1971, was enacted by Congress pursuant to §5 of the Fourteenth Amendment in order to enforce that Amendment; and

WHEREAS, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, was enacted in order to ensure that private citizens have a meaningful opportunity to vindicate, through private enforcement actions, the important policies underlying civil rights laws such as §1983; and

WHEREAS, the purpose of §1983 was extended by judicial interpretation in Maine v. Thiboutot, 448 U.S. 1 (1980), so as to permit lawsuits for violations of statutes unrelated to civil or equal rights, while almost simultaneously, any immunity defense protecting local governmental entities was rejected in Owen v.-City of Independence, 445 U.S. 622 (1980); and

WHEREAS, as a result of such broad interpretation of well-meaning legislation, instances of actual violation of federally insured equal rights are being lost in a mass of creatively pleaded, frivolous or unnecessary lawsuits in which protection of rights has become secondary to the collection of attorney's fees; and

WHEREAS, the majority of these unnecessary, non-civil rights lawsuits are disposed of through nuisance-value settlements or unsuccessful litigation, but at the ultimate expense of the local, state and federal taxpayers; and

WHEREAS, the burdens placed on the courts in processing these actions and on municipal legal departments in investigating and defending against such claims are exacerbated by continuing confusion over the standards applicable to 1988 attorney's fees requests; and

WHEREAS, these problems have continued to plague governmental defendants, despite subsequent judicial attempts to clarify or narrow the potential scope of §1983 and §1988.

NOW, THEREFORE, BE IT RESOLVED that the National Institute of Municipal Law Officers fully supports legislation that would set a reasonable limit on the hourly rate for attorney's fees to be awarded under §1988 to a prevailing party similar to the rate allowed in the Equal Access to Justice Act; eliminate the use of multipliers or bonuses while establishing criteria by which courts may exercise discretion in reducing a fees award; consider the equity in requiring prevailing parties to pay a portion of their own legal expenses from any monetary judgement entered in their favor; prohibit interim fees awards and awards for services rendered subsequent to the making of a reasonable written offer of settlement that was rejected by the prevailing party; codify rules whereby a lawsuit is deemed to have been a catalyst for favorable governmental action and a fees applicant may be found to have met the burden of proof in demonstrating entitlement to an award; and provide a limitations period after resolution of the merits of a lawsuit in which a fees application must be made.

BE IT FURTHER RESOLVED that the National Institute of Municipal Law Officers continues to support legislation which would amend §1983 by providing that municipal defendants shall have available to them a qualified immunity defense on the same terms that such a defense is available to their municipal employees, and by limiting the scope of the applicable laws defining remediable rights, privileges and immunities to laws providing for equal rights.

Adopted at the 50th Annual Conference of the National Institute of Municipal Law Officers, Philadelphia, Pennsylvania, October 19, 1985.

Senator HATCH. Mr. Swift, we will turn to you.

STATEMENT OF LARRY SWIFT

Mr. SWIFT. Senator Hatch, I am Larry Swift, an attorney and executive director of the Washington State School Directors Association. I am here today testifying on behalf of the National School Boards Association.

Let me begin by saying that the NSBA supports the original intent of section 1988; that is, assurance that disadvantaged citizens will not be denied the opportunity to bring actions alleging a violation of their civil rights because they lack the financial resources to pay for competent counsel.

Thus the purpose of NSBA's testimony today is not an attack on section 1988. Rather, the purpose of this testimony is in support of S. 1580 and the clarification that the Legal Fees Equity Act provides when determining the amount of attorneys' fees to be awarded in cases brought under section 1988.

Not unlike other units of State and local government, local school districts are experiencing an increase in fiscal liability as a result of civil rights type actions. This is true for three reasons.

First, school districts are often unrepresented by in-house counsel. Therefore, each case brought under section 1988 requires the school districts to retain private counsel.

Second, because of the lack of objective standards by which to adjudge the appropriate attorney fee award, school districts, like other units of local government, are often presented a bill for fees in amounts far exceeding those normally charged by practitioners in the local community.

Third, over the past year school districts across the country have been told, with increasing frequency, that their insurance carriers will either be unable to continue to offer them liability insurance or that their rates will be doubled, tripled or increased even more.

One of the major explanations by insurance carriers for this action is the unpredictability of attorney fee awards: not the fact that the school districts are losing cases, not the fact that school districts are acting in wilful disregard of the law, but rather because of the unpredictability of attorney fee awards.

Although it used to seem inconceivable that a school should continue to operate buses, offer athletic activities or allow any person to enter upon its premises without the district carrying liability insurance, that is the situation today in many school districts. In my State, for example, the School District of Seattle is without insurance today.

Unfortunately, that could become the norm for many school districts in my State and across the Nation.

Because of the unique questions school districts are called upon to decide vis-a-vis the competing constitutional claims of their students, school districts often find themselves in a catch-22 situation. For instance, in a recent case, *Bender* v. *Williamsport*—a case involving both the first amendment right of free speech and the establishment clause—the school district was unable to make a decision which would not subject it to a cause of action based on civil rights grounds.

In that case, a group of students requested the opportunity to meet on school property for the purpose of praying, alleging that denial of such an opportunity was a denial of their right of free speech. Alternatively, the school district's legal counsel advised that such a meeting violated the other students' right to separation of church and State under the establishment clause of the Constitution.

The school district is in the unenviable position of being sued on unsettled constitutional grounds no matter what it does and, under section 1988, of being held fully responsible for all costs and attorneys' fees if it fails to predict a future vote in the Supreme Court.

This is particularly acute in my State where all school boards are under a mandate of the State board of education to adopt policies articulating the religious freedom rights of students in their schools. Faced with this uncertain situation in many constitutional arenas, they are confronted by a catch-22 situation not unlike that described by the chief justice of Oregon.

While S. 1580 would not disallow that fee award in the *Williamsport* case, it would proscribe the use of multipliers and bonuses in a situation where in the school district was clearly the forum for and not the direct cause of a purported civil rights violation.

The relationship between the amount of the fee award and the plaintiff was recently brought home in my State, Washington, in *Fraser* v. *Bethel School District*. In that case, a high school senior was disciplined for violating the school's disruptive conduct rule after delivering a nominating speech which used sexual innuendo as its selling point.

The student filed an action in Federal district court alleging that his right of free speech had been violated. The court issued a declaratory judgment that the school district had violated the student's rights, awarded the student $278 in damages and $12,750 in costs and attorneys' fees: more than 45 times the monetary award to the plaintiff.

School boards, at times, perform quasi judicial type functions. Thus, again the comments of the chief justice of the Oregon Supreme Court are applicable in the context of school boards.

Again, NSBA supports the original intent of section 1988 and supports S. 1580. That support is predicated on what we perceive as a need to balance the unpredictable elements of the section 1988 attorney fee awards against the right of the public to ensure that their tax dollars are spent wisely and judiciously.

We thank the committee for this opportunity to testify and intend to supplement these remarks with a written brief.

Senator HATCH. Thank you so much. We appreciate having both of you testify here today.

[Statement follows:]

PREPARED STATEMENT OF LARRY SWIFT

I. PREFACE

I am Larry Swift, an Attorney and Executive Director of the Washington State School Directors' Association representing the National School Boards Association (NSBA). I am pleased that we can submit this testimony to the Senate Judiciary Subcommittee on the Constitution. The National School Boards Association is the only major education organization representing school board members who govern the nation's public school districts. Throughout the nation, approximately 95,000 of these individuals are Association members. These people, in turn, are responsible for the education of more than 95 precent of the nation's public school children.

Currently marking its forty-sixth year of service, NSBA is a federation of State school board associations, with direct local school board affiliates, constituted to strengthen local lay control of education and to work for the improvement of education. Most of these school board members are elected public officials. Accordingly, they are politically accountable to their constituents for both education policy and fiscal management. As lay unsalaried indiviuals, school board members are in the rather unique position of being able to judge legislative programs purely from the standpoint of public education, without consideration to their personal professional interest.

II. INTRODUCTION

Let me begin by saying that NSBA supports the original intent of 42 U.S.C. Section 1988. That is, assurance that disadvantaged citizens will not be denied the opportunity to bring meritorious actions alleging a violation of their civil rights because they lack the financial resources to pay for competent counsel.

Thus, the purpose of NSBA's testimony today is not an attack on the purpose of Section 1988 or, to deny that Section 1988 has not brought to justice a myriad of civil rights violations which, prior to 1976, languished unresolved as a result of pecuniary insufficiency on the part of would-be Plaintiffs. Rather, the purpose of this tesimony is in support of S. 1580, and the clarification that the Legal Fees Equity Act makes in determing the amount of attorney fees to be awarded in cases brought under Section 1988.

III. INCREASE IN FISCAL LIABILITY FOR ATTORNEY FEE AWARDS

Not unlike other units of State and local governments, local school districts are experiencing an increase in fiscal liability for attorney fee awards in cases styled as civil rights actions. This is true for two reasons. First, school districts are often unrepresented by in-house counsel. Therefore, each case brought under Section 1988 requires the school district to retain private counsel -- regardless of the merits of the claim brought against the school district. Secondly, because of the lack of objective standards by which to adjudge the appropriate attorney fee award school districts are often presented a bill for such fees which represents billing amounts far exceeding amounts normally charged by practitioners in the local community.

Over the past year, school districts across the country have been told with increasing frequency that their insurance carriers will either be unable to continue to offer them liability insurance or, that their rates will be doubled or even tripled. One of the major explanations by insurance carriers for this action is the unpredictability of attorney fee awards . . . not the fact that the school districts are losing cases, not the fact that school districts are acting in willful disregard of the law, but based on the unpredictability of the attorney fee award should

-- hypothetically -- the school district settle a case or, be unsuccessful in defending a claim. Although it is inconceivable that a school should continue to operate buses, field sporting events, or allow any person to enter onto its premises without liability insurance, that is the situation that may well be the norm if insurance carriers continue to perceive unpredictable attorney fee awards as a hurdle to writing insurance policies.

IV. SOURCE OF ATTORNEY FEE AWARDS

Notwithstanding the question of insurance coverage, the funds to pay attorney fees do not come from a bottomless cache. Rather, these awards must come from the already beleagured pocket of education services. No one in a school district is becoming rich on the spoils of civil rights. The money to pay these fees comes directly from the taxpayers' pocket. Because this is so, local school boards have an obligation to ensure that it is spent wisely to benefit the taxpayer in proportion to the end it achieves. This is no less true in the payment of an attorney fee award than it is for any other expenditure the school makes.

However, at the present time, a school district which questions the amount of an attorney fee bill subjects itself to additional litigation on the issues only of attorney fees. Although such litigation may well be meritorious as a protection of the taxpayer, it further eats away at limited education service budgets for payment of fees to the school district attorney to pursue equitable resolution of the issue.

V. BENDER V. WILLIAMSPORT

Because of the unique questions school districts are called upon to decide vis-a-vis the competing constitutional claims of its students, school districts often find themselves in a

"Catch-22". For instance, in Bender v. Williamsport (741 F.2d 538 [1984]), a case involving both the First Amendment and the Establishment Clause, the school district was unable to make a decision which would not subject it to a cause of action based on civil rights grounds. In that case, a group of students requested the opportunity to meet on school property for the purpose of praying, alleging that denial of such an opportunity was a denial of their right to free speech. Alternatively, the school district's legal counsel advised that such a meeting violated the other students' right to separation of Church and State under the Establishment Clause of the Constitution. The school district is in the unenviable position of being sued on unsettled Constitutional grounds no matter what it does and, under Section 1988 of being held for fully responsible for all costs and attorneys' fees if it fails to predict a future vote in the Supreme Court.

While S. 1580 would not disallow that fee award, it would proscribe the use of multipliers and bonuses in a situation wherein the school district was clearly the forum for and, not the direct cause of a purported civil rights violation.

VI. FRASER V. BETHEL

The relationship between the amount of the fee award, and the Plaintiff was recently brought home in the State of Washington in Fraser v. Bethel (755 F.2d 1356). In this case a high school senior was charged with violating the school's disruptive conduct rule after delivering a nominating speech which used sexual innuendos as its selling point. The student was suspended for three days and informed that his name would be removed from a previously approved list of candidates on the ballot for graduation speakers. The student filed an action in Federal District Court alleging that his right to free speech had been violated. The Court issued a declaratory judgment that the school district had violated the student's rights, awarded that student $278 in damages and $12,750 in costs and attorney fees . . . more than 45 times the montary award to the Plaintiff.

VII. CONCLUSION

Again, NSBA supports the original intent of Section 1988. NSBA's support for S. 1580 is not intended as a withdrawal of support for the continued existence of attorney fee awards to prevailing Plaintiffs in Section 1988 cases. Rather, NSBA's support for S. 1580 is predicated on what NSBA perceives as a need to balance the unpredictable elements of the Section 1988 attorney fee awards against the right of the public to ensure that their tax dollars are spent wisely and judiciously.

In closing, I would like to thank the Committee for extending to NSBA the opportunity to testify before them today. Extension of this testimony will delineate specific examples of the issues raised during this testimony which examples were necessarily set aside due to constraints on your time.

Senator HATCH. Both of your testimonies suggest that potential fees liability often affects government decisionmaking even before a case is filed. For instance, in one case brought to the attention of our subcommittee a local jurisdiction was threatened with extensive lawsuits springing from the first amendment if it attempted to even shut down a pornographic bookstore.

After considering the cost of paying its own attorneys and, of course, the prospect of paying the opponent's fees as well, the town elected not to undertake the action.

In another instance, a small Kansas town learned of its potential liability and found that insurance would exceed the town's total budget just to get the insurance. Accordingly, the town fathers elected to disband the town rather than put up with that.

I might say that in my own home State of Utah many of our elected officials out there have explained the dilemma posed by the specter of unpredictable fees liability.

Now, let me just ask both of you: To what extent have you found that the threat of fees liability influences government decisions one way or the other? We will start with you, Mr. Witt.

Mr. WITT. Well, I can't tell you about any specific instance, Senator Hatch, but I certainly feel that in the background of the decisionmaking process of local government, as I mentioned in my remarks earlier this morning, there is a reluctance to make those hard decisions that have to be made in the interests of good government because of the fear of liability and attorneys' fees and all the costs associated with defending yourself and your city after having made such a decision.

Senator HATCH. Yes. How about you, Mr. Swift?

Mr. SWIFT. It is certainly the case in our State. I mentioned the situation where our school boards are mandated to adopt policies articulating religious freedom rights.

Many of our school districts are being advised by legal counsel to ignore that mandate, that legal obligation. They are being advised to do so because of the uncertainty of the state of constitutional law.

The reason for that is not because of any monetary awards that are likely, but rather because of the cost of litigation that is involved. We have the ACLU, on the one hand, and the Christian Legal Society, on the other hand, standing ready to institute lawsuits against school boards in our State and the only out for many of them is to wilfully ignore the law.

That, of course, is, I think, an unprecedented problem when we have the school boards in our State, who are responsible for the governance of education, modeling behavior for students, in this case, to ignore the law.

Senator HATCH. The ABA has promulgated a rule governing attorneys' fees in private practice. They recommend, in their model rule, 1.5, that the best way to handle fees ethically is to disclose the amount of your fee in advance.

Now, in this case, where the attorney's client is a city or a school board, how can they disclose the actual amount of potential cost of litigation? How do you plan in your budgets for uncertain fee awards, and how does this certainty affect your decisionmaking?

I mean, if you just ask those questions rhetorically, you have to say they are really unanswerable. There's no way you can plan for these types of things.

Therefore, it's nice to have a rule; but it just doesn't work in practice.

Let me mention this. As I stated at the outset of this hearing, the Supreme Court has issued many opinions on the subject of fee-shifting. Now, have these recent opinions, like the *Blum* case and the *Eckerhart* case, provided trial courts with sufficient guidance with regard to the many potential fee award issues?

What do you think, Mr. Witt?

Mr. WITT. The short answer to that is no, Senator, and I think that's what S. 1580 provides, is that type of guidance and that set of sure standards that everybody can rely on.

Senator HATCH. Well, one last thing. In your mind, should S. 1580 be interpreted as inhibiting, in any sense, the enforcement of the legitimate civil rights of those who could not otherwise afford legal costs?

Mr. WITT. No, sir. As I mentioned in my remarks earlier, I believe that S. 1580 does not, in any way, inhibit the rights of individuals to enforce their civil rights. In fact, it maintains the basic fee-shifting purpose of section 1988, but within a reasonable standard.

Senator HATCH. Do you agree with that?

Mr. SWIFT. Exactly. That is exactly right. As you indicated, one of the essential qualities in public governance is the ability to predict your costs, to establish financial stability.

Senator HATCH. Right.

Mr. SWIFT. One has to recognize that once budgets are established any unanticipated costs come directly from the services, the public services, being provided. In the schools' case, that's instructional services to children.

There simply is no ability to take an unanticipated cost and pass it immediately off to taxpayers. It will affect the quality and level of services made available to the children of that school district.

Senator HATCH. I want to thank both of you for being here today and for bringing your testimony to the attention of the committee.

Mr. WITT. Thank you very much.

Mr. SWIFT. Thank you.

Senator HATCH. Our last panel of witnesses will be Phil Sunderland of Terris & Sunderland Associates in Washington, DC; James E. Ferguson II of Ferguson, Watt, Wallas & Atkins from Charlotte, NC; and E. Richard Larson of the American Civil Liberties Union out of New York, NY.

We are delighted to welcome you gentlemen. We will begin with you, Mr. Sunderland, then we will go to Mr. Ferguson, and finally to Mr. Larson.

STATEMENT OF PANEL CONSISTING OF PHILIP G. SUNDERLAND, TERRIS & SUNDERLAND ASSOCIATES; JAMES E. FERGUSON II, FERGUSON, WATT, WALLAS & ATKINS; AND E. RICHARD LARSON, AMERICAN CIVIL LIBERTIES UNION

Mr. SUNDERLAND. Good morning, Mr. Chairman. My name is Phil Sunderland. I am a private attorney with the law firm of Terris & Sunderland here in Washington, DC.

Mr. Chairman, I have submitted a written statement which I believe as received by your staff yesterday.

Senator HATCH. Without objection, we will put it in the record. We are going to limit you to 5 minutes each.

Mr. SUNDERLAND. I understand.

Senator HATCH. We will put all written statements in the record as though read.

Mr. SUNDERLAND. Let me, extemporaneously, move on if I can for approximately 5 minutes of time. I would like to address today, Mr. Chairman, two matters.

First, I would like to give a brief description of my law firm in Washington, DC; and, second, I would like to describe, briefly, the impact of Senate bill 1580 upon that law firm and, in particular, the public interest practice which we have.

Mr. Chairman, we are a private law firm, which means that we depend entirely upon fees paid by clients and, in part, by defendants in litigation brought under various fee-shifting public interest statutes. We are a firm which engages exclusively in litigation in the Federal courts and before Federal agencies, and we do so exclusively in areas which have come to be known as public interest law: specifically, in the environmental area, in the area of civil rights, and in the area of employment law.

We are, I believe, a unique firm, at least to my knowledge, because we have no business, commercial or traditional form or type of practice which supports our public interest work. Our success, therefore, in a real world economic sense depends entirely upon the fees which we derive from clients and from defendants in what I'm calling today fee-shifting of public interest cases.

One point I want to emphasize, Mr. Chairman, is that a significant portion of our work involves work as private attorneys general; and that is work which is performed in both the environmental and the civil rights areas on a contingent basis for needy non-fee-paying clients. By that, of course, I mean that our clients do not pay us any fees; they're not obligated to pay us any fees; and we, in conducting this private attorney general or public interest litigation, do so looking entirely to a court award at the end of the litigation for our fees.

Indeed, I estimate that 50 to 60 percent of the current workload in our office today is precisely this type of public interest contingent representation.

Now, the major matter I want to address, Mr. Chairman, is why we, as private attorneys, are willing and, indeed, capable of assuming the private attorney general role.

First of all, we do so because it's obviously consistent with the underlying congressional intent in numerous feeshifting statutes—

that intent being to attract competent first-rate private counsel, private attorney representation in public interest cases.

The second, and the more important factor, Mr. Chairman, is that we have determined that it's economically possible and feasible under the existing fee-shifting law today for us, as a private law firm, to assume this contingent representation. The major purpose in being here Mr. Chairman, is to tell you the factors which lay behind this economic feasibility determination.

These factors are immensely critical, I believe, in determining the ramifications which Senate bill 1580, as now written, will have upon both the capacity and, therefore, the willingness of private attorneys in this country to continue to provide contingent private attorney general representation under fee-shifting statutes.

I emphasize, as I have in my written statement, that I speak today not merely as an attorney or as a public interest attorney, but as a small businessman who runs a private law firm, and who is forced to make economic decisions based on the real, concrete economic considerations and consequences associated with running a small business.

There are five economic feasibility factors which I'd like to address. Four of these, Mr. Chairman, make the provision of contingent representation in public interest litigation from a private attorney economic point of view totally infeasible.

First of all, there is the risk in these cases of never prevailing in the litigation, of receiving no fees whatsoever at the end of the lawsuit.

Second, there is the significant possibility under existing law of receiving significant undercompensation for the work that is taken on. My firm, in various pieces of litigation, has not had all the work that we have put in on the case compensated by the courts. This notion, this risk of undercompensation is a compelling disincentive for taking on contingent representation in public interest cases.

A third negative factor is the enormous delay frequently incurred by our firm and others in receiving any fees under fee-shifting statutes. I have said in my written statement, Mr. Chairman, that at this time my firm has over 20 environmental cases pending around the country which are designed to enforce the antipollution provisions of the Clean Water Act. These cases have been pending since 1983 and I don't anticipate receiving any fees in these cases for another 18 months. This means that our firm, in over 20 lawsuits, has gone or will have gone for over 4 years without receiving any fees. This risk of substantial delay in receiving compensation is another compelling disincentive to acting as private attorney general.

There are two positive reasons, two positive economic inducements for a private attorney to act as a private attorney general and to provide contingent representation.

Senator **Hatch**. Mr. Sunderland, your time is up, but please finish discussing the two inducements.

Mr. **Sunderland**. Thank you very much.

My point, Mr. Chairman, is that both of these important economic inducements are removed by Senate bill 1580.

The first is the very real possibility of receiving at the end of the litigation compensation based upon market rates prevailing in the community in which we practice, which of course is Washington, DC. Senate bill 1580, by putting a $75-an-hour cap on the hourly rate—a rate which is significantly below the market rates for legal services in the Washington, DC area—removes an enormously compelling economic inducement for private attorneys to come into this type of litigation.

The second positive inducement which is eliminated by the bill pertains to contingency adjustment. The bill prohibits multipliers and bonuses, as you know. The ability to get a contingency adjustment is absolutely essential for a private firm like us, operating, as we do, at the margin, to be willing to take on these types of cases on a contingency basis.

Indeed without market-rate compensation and without the possibility of having contingent representation, it is not only economically infeasible, Mr. Chairman, for us to take on the representation, it's economic suicide.

Senator **Hatch**. Alright. We understand.

Mr. **Sunderland**. Thank you, sir.

[Statement follows:]

PREPARED STATEMENT OF PHILIP G. SUNDERLAND

Mr. Chairman and members of the subcommittee, my name is Philip G. Sunderland. I am a partner in the Washington, D.C., law firm of Terris & Sunderland. I am a 1972 graduate of the Stanford Law School. I have been practicing law in Washington, D.C., since 1973.

I appreciate the opportunity to present testimony today regarding Senate Bill 1580, the "Legal Fees Equity Act." Although I have sought legal fees on a number of occasions from federal courts and federal agencies, I do not consider myself an expert on the law of attorneys' fees, and I do not appear before you today in that capacity. Rather, I am here primarily to address a single matter: the practical, real world impact which Senate Bill 1580, if enacted, will have upon the ability and willingness of small private law firms like mine to continue to represent environmental and civil rights clients on a contingent basis in litigation which is intended not only to remedy individual injuries but to enforce the nation's environmental and civil rights laws.

My message, Mr. Chairman, is quite simple. This bill, as now written with its prohibition against multipliers and bonuses and its $75 cap on hourly rates, will terminate the ability and, as a result, the willingness of my firm to continue providing contingent representation in environmental, civil rights and similar cases involving governmental defendants. This message is not a threat or ploy which is designed to achieve amendments to the bill which I might consider desirable. The message is a sincere, good faith statement, based upon the day-to-day economics of running a small law firm which has done its best over the years to keep its salaries, overhead and capital expenditures to a minimum. My message, I believe, can and should be extended to other firms. If a firm like mine which is already operating at the lower end of the economic spectrum cannot, under the provisions of this bill, continue to provide contingent representation to plaintiffs in environmental and civil rights litigation, I do not see how it is possible for other firms, operating in the middle or the upper end of that spectrum, to do so either.

Let me briefly describe our law firm and our work. We are a private law firm, which means that we survive on fees paid by our clients or by defendants in litigation brought under a federal fee-shifting statute. We are a firm of nine attorneys, three of whom work part time. Our work consists almost entirely of litigation in the federal courts and before federal agencies. This litigation occurs exclusively in areas which have come to be associated with public interest law -- namely, environmental, civil rights and employment law. I estimate that today our litigation workload is 60-70% in the environmental area, 15-20% in the civil rights area and the remainder in the employment area. Our clients in these cases are typically environmental organizations, citizen groups or individuals opposed to an environmental regulation or project, individuals who, in their status as a worker, coal miner or a home seeker, have incurred some form of discrimination, and employees who believe they have been unfairly disciplined or discharged from their jobs. We do not have a commercial, business or other type of traditional practice which supports our public interest work. Thus, whether we make it from day to day and from year to year depends entirely upon the fees we receive in our public interest cases from clients and from the defendants against whom we have prevailed and who have been ordered to pay our fees.

A very significant portion of our current litigation work is performed for clients on a contingent basis. By that, I mean that we do not charge our clients, and they are not obligated to pay, for our work. Rather, our receipt of fees is completely dependent upon our prevailing in the litigation and obtaining an award of fees from the court. For instance, the vast majority of our present environmental work involves litigation in federal district court brought pursuant to the citizens suit provision in Section 505 of the Federal Water Pollution Control Act, 33 U.S.C.

1365. We currently represent environmental groups in over 20 actions against companies which are discharging pollution into the nation's waterways in excess of the levels which are allowed by the permits they have received from the U.S. Environmental Protection Agency or the states in which they are located. In these cases, we will be paid for our work only if our clients ultimately prevail and the courts issue an award of fees under Section 505 of the Water Act. Similarly, the majority of our civil rights work, which is in the employment area, is being performed on a contingent basis. Thus, we will receive compensation for this work only if we ultimately succeed in the litigation and the court enters an order requiring the defendant to pay our fees under Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e, *et seq*.

In undertaking this contingent fee work, we believe that we have done precisely what Congress desired private lawyers to do when it enacted the fee-shifting provisions in the Water Act and Title VII -- namely, to represent clients who cannot afford to retain private counsel in actions which enforce the anti-pollution and anti-discrimination provisions of these statutes. I emphasize, however, that we have been willing to provide this contingent representation only because we have determined it is *economically feasible* for us to do so. A major purpose of my testimony, Mr. Chairman, is to convey to the members of this subcommittee the considerations or factors which go into this "economic feasibility" determination, for they are critical to an understanding of the ramifications which Senate Bill 1580 will have upon the ability and willingness of private law firms to continue to provide contingent representation in actions brought under federal environmental, civil rights and other fee-shifting statutes against governmental defendants.

Here, Mr. Chairman, I must stress that I am not speaking merely as a public interest lawyer who believes deeply in the private enforcement of the country's environmental and civil rights laws. Instead, I am talking as a public interest lawyer who is also a small businessman and who, as such, is forced to, and does, make decisions regarding his practice of law which are based upon concrete economic considerations and consequences.

Let me first address the "economic feasibility" factors which would lead any economically rational private attorney never to provide contingent representation in litigation brought under a federal fee-shifting statute. There are four such negative "economic feasibility" factors.

First, there is the risk of not prevailing in the litigation, which means that no fees whatsoever will be received. In many of my firm's pending Water Act enforcement cases, this would mean a loss or non-payment of $25,000 to $100,000 in fees ad expenses. In some cases, it would be a considerably larger sum. This is a loss, to put it mildly, which a firm of our size cannot and does not take lightly, and the risk of it occurring constitutes a strong disincentive to providing contingent representation. Indeed, when an attorney can represent a fee-paying client and thus can be assured of receiving payment for his work, there is little economic reason for him to provide services in cases, despite their public importance and Congress' desires, in which he may receive no payment at all.

Second, there is the high probability that, even if his client prevails in the litigation, the attorney will not be compensated for all of the time he has put into the case. Whether it is because his client did not prevail on certain issues in the litigation, because the court found the number of hours spent on certain tasks to be too high or because the court felt he should have settled his client's claims at an early stage of the case, there are many devices which enable the courts to decline to compensate significant portions of work which has actually been performed by the attorney. This risk of significant under-compensation is another powerful economic disincentive to providing contingent representation. This becomes an even stronger disincentive where the attorney can hire himself out to a fee-paying client and obtain payment for all the time he believes, after exercising his own reasonable billing judgment, he is entitled to be paid.

Third, even if the attorney prevails for his client and obtains a fee award from the court, there is a significant delay in his actual receipt of the fees. In my firm's Water Act enforcement cases, we have been in litigation since the spring of 1983 and have yet to receive a single fee award from a court, even though we have repeatedly prevailed in establishing the defendants' violations of the Act. Moreover, due to court delays, trial postponements and expected appeals, I do not expect actual receipt of any substantial amount of court-awarded fees in these cases for at least another 18 months. Thus, at best, we will have gone for almost four years in many of these cases without receiving any fees. I can assure you that this lack of revenue has produced significant financial difficulties in my firm and has required that, like any other small business, we obtain outside financing, at considerable cost, to enable us to continue operations. Delays of this sort are a compelling economic disincentive to taking cases on a contingent basis. Indeed, if an attorney can represent a fee-paying client and receive payment for his work within 30 to 60 days of his billing statement, there is little economic reason for him to provide contingent representation in cases where he stands to go for years without any payment whatsoever.

Finally, there is the knowledge that often none of these negative "economic feasibility" factors is applicable to opposing counsel. To the contrary, the defendant frequently retains private counsel who face no risk of being paid for none of their work, who will be paid for all the work they bill and who will be paid soon after their work is performed. Thus, the factors which force the attorney providing contingent representation to economize in his work and to seek a quick and efficient resolution of the case do not operate upon his adversaries. Litigating at high hourly rates for clients with substantial resources, his adversaries are able to pursue every issue, to dispute every fact and generally to draw out the litigation. The consequences of this upon the attorney who is providing contingent representation are obvious: he is required to put in many more hours for which he receives no immediate payment and for which he may receive no payment at all, and the already lengthy delay in any payment he might receive becomes even longer.

What then induces the economically rational private attorney to provide contingent representation in environmental, civil rights and similar cases involving a federal fee-shifting statute? It is not, I emphasize, the possibility of taking a 25% or 35% cut of his client's monetary recovery -- i.e., the type of recovery which is sufficient to induce many private attorneys to provide contingent representation in personal injury cases. In my firm's environmental cases, the monetary relief ordered by the courts takes the form of civil penalties which the defendants pay directly to the United States Treasury. If a case is settled, the defendant's monetary payment may go to an environmental project. In any event, our clients do not receive a dollar from these cases. Consequently, there is no fund from which we, as their attorneys, can take a percentage. In our civil rights litigation, injunctive relief is frequently the major form of relief which is sought. Where monetary relief is pursued, which in our practice usually occurs in cases involving individual workers, miners or home seekers, the relief rarely exceeds $10,000 or $15,000. These cases never produce a monetary recovery which is sufficient both to pay our attorneys' fees and to provide genuine compensation to our clients for the violation of their civil rights.

In the past, two factors have overcome the negative "economic feasibility" factors described above and have provided the inducement to my firm to provide contingent representation in environmental and civil rights cases. The first of these factors is the ability, in the event our clients prevail, to obtain compensation for our time at the market rates for legal services prevailing in the area in which we practice. For instance, the prevailing market rate in the Washington, D.C., area for an attorney of my experience handling federal litigation is significantly higher than $100 an hour and ranges up to $175 or higher. The knowledge that the time which my firm spends in a case will be compensated at full market rates has been a critical economic factor in our decision to provide representation to clients on a contingent basis.

The second critical factor has been the possibility of receiving a "contingency adjustment -- i.e., some additional compensation in return for our having taken a case with the potential for only a small monetary recovery on a non fee-paying, contingent basis and for having then prevailed. The importance of this contingency adjustment is that it provides a genuine economic reason for assuming the risks presented by the four negative "economic feasibility" factors discussed above. Market rate compensation, at best, merely puts the attorney in approximately the same economic position he would be in had he represented a fee-paying client. The potential of receiving such compensation does not warrant the assumption of the risks of total non-payment and of a substantially delayed and reduced payment. The contingency adjustment provides the concrete financial incentive to assume these risks.

Further, the contingency adjustment enables the private attorney to deal economically with the risk that he will not prevail in some of his contingent cases and therefore will receive no payment at all. By providing additional compensation in the cases in which he prevails, the adjustment allows the attorney to conclude that providing contingent representation in many environmental, civil rights and similar cases, some of which he will partially or completely lose, is economically feasible.

Senate Bill 1580, in my view, precludes such a conclusion from ever being reached by an economically rational private attorney. In establishing a maximum hourly rate for fees at $75 and abolishing even the possibility of a contingency adjustment, the bill effectively removes the *only* economic incentives for a private attorney to provide contingent representation to clients in cases arising under federal fee-shifting statutes and involving governmental defendants. The bill therefore renders it *economically infeasible* for a private law firm like mine to provide contingent representation in such litigation.

Indeed, I do not believe that any economically rational businessman, including a private attorney, would ever provide services to clients, no matter how consistent with public policy, (1) where there is the potential he will never receive payment for his services, (2) where, if he is paid, all of his services will likely not be compensated, (3) where any compensation he does receive for his services will likely not be paid until years after they have been performed, and (4) where the compensation he might receive will be at a rate considerably below -- as much as 50% or even more -- the rate he could have obtained by selling his services in the marketplace to individuals who could afford them. Mr. Chairman, I consider myself to be such an economically rational businessman, and I can guarantee you that, if court-awarded attorneys' fees are limited to a $75 maximum hourly rate and there is no possibility for a contingency adjustment, my firm will no longer be economically capable, and therefore will no longer be willing, to represent clients in environmental or civil rights litigation for no fees and on a contingent basis. To do so, to put it frankly, would be economic suicide.

Just think for a moment of the ramifications of doing so. Let's assume that my firm agreed to represent clients in four environmental cases, that in each case we performed 250 hours of attorney work, that we prevailed in two of the cases and lost the other two and that, in the cases in which we prevailed, the court compensated 80% of our time at an hourly rate of $75 an hour with no contingency adjustment. In this situation, we would have put in 1,000 hours of legal work, would have been compensated for 400 or 40% of them and would have received a total compensation of $30,000. If, instead, we had spent those 1,000 hours on behalf of fee-paying clients who were paying market rates, we would have received fees in the range of $100,000, over three times what we would have received in court-awarded fees. Even if we prevailed in three of the four cases and all of our time in those cases was compensated, we would receive compensation for 750 hours which, at $75 an hour, comes to $56,250, approximately 50% of the amount we would have received in the market from fee-paying clients. I do not need to explain why, in these circumstances, we would be deterred from representing clients in these cases on a contingent basis.

In summary, I do not believe that any private attorney who is faced with real world salaries, taxes, rent, utilities, insurance and other items of overhead can possibly act on any regular basis as a private attorney general, helping to enforce the nation's environmental, civil rights and similar laws, under the terms of Senate Bill 1580. I know, Mr. Chairman, that I cannot and, as much as I hate to say it, I know that I will not. I strongly believe that other private attorneys with a practice similar to mine will be forced to reach the same conclusion. By effectively removing the only economic incentives for a private attorney to provide contingent representation to needy clients in public interest litigation brought against governmental defendants, this bill will prevent firms like mine from operating any longer in such litigation as private attorneys general.

I personally believe this would be poor public policy. However, as stated previously, the purpose of my testimony has not been to argue policy but to address the real world impacts of the bill before you. I have done so. I ask that you be fully cognizant of those impacts in your further deliberations.

Finally, Mr. Chairman, let me make two additional points.

First, the idea has somehow gained credance over the past few years that litigation under federal fee-shifting statutes is a financial bonanza for private attorneys, a source of windfall profits and an easy means of getting rich. This notion is a total myth. There are, I recognize, examples of what may appear to some to be excessive fee awards. But the notion that abuses of the fee-shifting system are rampant and that private lawyers are getting rich off the system is completely untrue. Indeed, if it were true, one would expect the courts to be clogged with environmental, civil rights and similar public interest litigation -- an expectation not borne out by reality. Moreover, to the degree truly excessive fee awards are being sought, there are numerous tools currently available to the courts to reject or reduce them. In short, there is simply no need for the major restrictions to the fee-award system which are contained in Senate Bill 1580.

Second, in all the clamor over attorneys' fees there is the tendency to lose sight of the fact that fee-shifting provisions in federal statutes are a means to achieve an end -- specifically, protection of the individuals and the interests identified by Congress in those statutes. It is this end, not the "attorneys' fees" means, which should be the paramount consideration in any discussion on Senate Bill 1580. Thus, the critical issue posed by the bill is whether it will diminish the ability of individuals who possess a valid claim under a fee-shifting statute to pursue that claim and thereby to further the public interest. In my view, for the reasons previously stated, the bill will have precisely this effect. Whether or not you adhere to this view, I emphasize that the dominant consideration in acting on this bill should not be attorneys and their fees, but injured individuals who must have access to private attorneys if they are to remedy their injuries and enforce the public interest.

Senator HATCH. Mr. Ferguson, let's turn to you.

STATEMENT OF JAMES E. FERGUSON II

Mr. FERGUSON. Mr. Chairman, thank you for this opportunity to appear before the committee today.

Senator HATCH. You are welcome.

Mr. FERGUSON. I am James Ferguson from Charlotte. I am in the private practice of law.

I am senior partner in my firm, which consists of 12 lawyers. Since the inception of the firm in 1968, we have engaged in civil rights cases on a regular basis. Now, that is not all we do as a firm because we could not possibly exist as a law firm on the fees that are generated by civil rights cases.

But because we are committed to enforcing the civil rights laws as private attorneys general and because we are committed to seeing that the victims of discrimination or violation of rights by the Government have those rights redressed, we have a substantial component of our law firm that is engaged in the civil rights practice.

I want to talk just a little bit today about the real world and the impact that S. 1580 would have on private practitioners such as myself. But first let me point out that there are precious few law firms in North Carolina, in the South and in other parts of this country who are willing to take on civil rights cases on a regular basis.

There is no other firm in my State that devotes that proportion of time and resources to civil rights cases as my firm does. In order to do civil rights cases on a competent basis I submit to you one has to do enough of it to build up an expertise in the area.

Senator HATCH. It is definitely a complex area.

Mr. FERGUSON. My fear is that this legislation that is proposed would make it difficult if not impossible for firms such as mine and practitioners individually, such as myself, to continue to handle civil rights cases.

First of all, by handling these cases we give up a number of cases that might otherwise come to the firm for two reasons. One is that by devoting the time to civil rights cases, then of course you don't have the time to devote to other cases.

The other reason, and perhaps it is even more important, is that the very nature of these cases is such that people begin to view you as a civil rights practitioner. When they have the other fee-generating cases, they often go elsewhere rather than to the civil rights firm, and they come to you with those cases that involve civil rights and which, by their very nature, are likely to be less financially remunerative than other cases that one might handle.

Now, what we deal with on a daily basis is that people who feel that their civil rights have been violated by the Government will pick up the phone and call, and either talk to a lawyer on the phone or set up an appointment and come in.

Then we have to go through a screening process. One of the things that is foremost in our minds in screening these cases is that in order to make this case economically viable, in order to bring this case, we have to be able to determine at the outset that there is a likelihood of success in that case so that the frivolous cases get weeded out in the meantime.

The second thing we have to look at is how quickly this case will turn over because we have expenses on an ongoing basis that we have to take care of. We have to pay our secretaries every week. We have to pay our rent every month. We have to pay our regular bill collectors within the billing cycle, otherwise our credit goes bad.

Therefore we are not interested in protracted litigation. It is to our advantage to resolve a case quickly.

In setting up the economics of our office, we have to be able to depend on market rates for lawyers because everything is geared to that in the amounts of money that law firms have to pay to operate, and we cannot operate on any cheaper basis simply because we do civil rights cases.

We have to pay the same thing to our bill collectors as the silk-stocking firms uptown pay to their bill collectors. Xerox machines cost the same, typewriters cost the same, copying machines cost the same, rent costs the same. They don't reduce any of that for us because we happen to litigate some cases against the Government.

It is impossible to do that with an expectation of $75 an hour in some cases. The contingency factor that has already been mentioned is very great in these cases. Even the best cases are cases that you know you run a risk of losing because the rules may change in the middle of the stream and you may litigate a case all the way to the Supreme Court, and find out that although you had a sound basis for litigation of the case at the outset by the time the case is ultimately concluded that basis is no longer there and you may have spent thousands of hours in lawyer time to litigate that case only to find that you have to eat those expenses because our clients are poor people.

They don't have the money to pay lawyers even $75 an hour to handle a case.

If we're not able to expect that we will be paid market rates at the end of a case where we are successful, if we are not able to expect that in those cases where we have done an extraordinary service for our clients there will be some multiplier which may actually get us to the market rates after you have factored in the time that it takes to get the money for the fee, the number of cases that have come through the office that did not result in a fee, and other factors that affect these kinds of cases, then there is no way that we can continue to operate.

If we were in a situation where we knew that for every client who walked into the office with a case, if we accepted it, the case was going to pay a certain amount of dollars per hour, that would be very different.

Senator **Hatch**. I understand, Mr. Ferguson, but you make a good point. We will certainly consider that.

Mr. **Ferguson**. Thank you, Senator.

Let me just finally say that there are other ways of accomplishing the objectives that this committee has in mind besides setting an arbitrary cap on fees. One way is to determine what the market rates are in the various communities and set up fee schedules based upon those market rates that take into account the skill, experience of lawyers and the skill and experience of others involved in their practice.

Senator **Hatch**. Would you still have a multiplier?

Mr. **Ferguson**. I think the multiplier should still be applied because of the contingency high-risk nature of these kinds of cases.

Senator **Hatch**. Keep in mind, the argument against that is that perhaps lawyers should be a little more selective in taking cases that should be brought rather than bringing everything that they do.

Sometimes, some of the suits aren't great cases, as well. On the other hand, you don't want to deprive anybody from bringing a legitimate case.

Mr. **Ferguson**. Well, there is already built into the law, Senator, sanctions against taking frivolous cases.

Senator **Hatch**. OK.

Mr. **Ferguson**. One, is that the judge has control of whether or not to allow fees at the end of the case.

Senator **Hatch**. Sure.

Mr. **Ferguson**. Two, is that any lawyer whose economic livelihood depends upon success in a case is not going to bring frivolous cases because he knows that there's no return in the case.

Senator **Hatch**. I understand. OK. Thank you.

Mr. **Ferguson**. Thank you, Senator.

[Statement follows:]

PREPARED STATEMENT OF JAMES E. FERGUSON, II

Mr. Chairman and members of the Subcommittee, I wish to thank you for the privilege of appearing before you to express my strenuous opposition to S.1580, a Bill which, if passed, will sound the death-knell to the private enforcement of federal civil rights laws against the government. I urge that this Bill not be reported out of this Subcommittee.

I am James E. Ferguson, II of Charlotte, North Carolina, senior partner in the law firm of Ferguson, Stein, Watt, Wallas & Adkins, P.A. Our firm, consisting now of 12 lawyers, has specialized in civil rights cases since its inception in 1968. In addition to our civil rights practice, we have a general practice, including criminal law, property, estates, corporate and business, personal injury, etc. One third of the lawyers with my firm devote almost all of their time to civil rights cases. Most of the remaining lawyers handle some civil rights cases. We have handled virtually every major civil rights case in the State of North Carolina since 1968, including Swann v. Mecklenburg, (school desegregation), Albemarle Paper Company v. Moody, (Title VII back pay and testing standards), Anderson v. Bessemer City, (employment discrimination standard of review), and Gingles v. Thornburg, (an important voting rights case now pending before the United States Supreme Court involving the interpretation of the new Voting Rights Act). My partners, former and present, my associates and I have brought hundreds of civil rights cases on behalf of aggrieved clients in an effort to enforce the promise of racial equality embodied in the Constitution and laws of the United States.

Contrary to the suggestion of the proponents of this Bill that attorneys bring cases under the various fee-shifting statutes in order to collect a fee, I can say, without equivocation, that we have never filed a lawsuit for the purpose of collecting a fee. Good judgment and practical economics dictate otherwise. Only in meritorious cases can the attorney expect a fee award, and, even then, only if the case is actually won. I believe this is true for most of the few attorneys who regularly handle civil rights cases for plaintiffs. It is certainly true of those I know around the country.

S. 1580 is both unnecessary and unwarranted in several respects. I will not attempt an analysis of the Bill because the statement of the American Civil Liberties Union provides an excellent analysis which I adopt. I will address the devastating practical effect that some of the provisions of the Bill will have upon private firms and practitioners such as myself who specialize in civil rights cases. Two of the more egregiously negative provisions of the Bill are (1) the $75 per hour maximum for fees, and (2) the requirement of significant relief before fees are allowed.

In well over 100 lawsuits, we have been successful in vindicating the rights of plaintiffs who have suffered all manner of civil rights violations at the hands of the government, federal, state or local. In all of these suits, our clients have had to depend on an award of fees and costs by the court in order to finance their cases. Without the benefit of court-awarded fees, we would have been financially unable to handle such a volume of cases and hundreds, perhaps thousands, of citizens would have gone without redress for wrongs done them by the government. In fact, the civil rights component of our law firm would have been seriously threatened without reasonable court awarded fees.

An arbitrary maximum of $75 per hour in today's market will seriously threaten and compromise our ability to continue to handle effectively the civil rights cases that come into our office on a daily basis. Virtually none of our clients and potential clients have the financial resources required for the handling of these cases and my firm simply is unable to underwrite these cases with no hope of realistic compensation.

We cannot maintain a practice in the civil rights area knowing that we run a risk in every case of not being able to recover fees at all and that in those where we do recover fees, they will barely be enough to cover costs.

In all of the cases that we have handled over the years, I have never known of a case where we have received a "windfall" from court awarded fees.

On the contrary, the court-awarded fees that we have received in civil rights cases have been barely enough to sustain the lawyers in our firm who have done most of our civil rights work. We have always had to rely on other areas of practice to make our firm financially viable. I believe that we are unique in that regard because there are very few firms or individual practitioners, for that matter, who are willing to subsidize a civil rights practice through income from other areas of law. But our commitment to bringing about a just society through law is deeply entrenched and we have and will continue to follow through on that commitment even at a financial sacrifice, if necessary.

This is not to say that we have never realized a profit on a civil rights case. On occasion, we have. Any such profit, however, has always come at the end of a long period of sacrifice, after we have subsidized the case with out-of-pocket expenses often amounting to tens of thousands of dollars, after an enormous amount of staff and attorney time has been poured into the case over several years with no payment and with the staff and attorneys involved relying on income from other areas in the office for their sustenance while the case is being litigated, and after years of anxiety, not knowing what the final outcome of the case will be and not knowing whether the case will result in a financial loss or whether there will be some recoupment. When fees are finally awarded by the court, they are less than market rates for the area where we practice and the years of waiting diminishes their value even further.

Moreover, the court may choose not to award fees for all time spent on the case.

Our plight as plaintiffs' attorney in civil rights cases is vastly different from that of defense counsel. When we take on a case, we do so not knowing whether we will be paid at all and, if ultimately paid, not knowing what we will be paid for. We cannot accurately gauge how much time will be required to develop a particular case, nor how much will be required for expenses in preparation and presentation of the case for trial. When defense counsel accepts a case, counsel knows that she or he will be paid for all time spent on the case, win, lose or draw. Defense counsel also knows that expenses will be paid by the client. He or she will bill and be paid contemporaneously. Thus, it does not much matter to defense counsel how much time is required to develop the case because all of that time will be compensable time. Moreover, defense counsel will be paid for time spent on the case, whether or not the time is devoted to issues which are ultimately ruled upon at the trial, or whether those issues are necessary to the resolution of the case.

Under the provisions of S.1580, undue pressure would be placed upon plaintiffs' counsel to limit issues and resources at the expense of the quality of litigation for the plaintiff. Of a necessity, litigation in the civil rights area regularly involves novel and creative approaches to an age-old problem. If only a safe approach is taken, the purposes of remedial civil rights statutes would be stymied and the law would become stagnant. Thus, we cannot effectively litigate civil rights cases using only the approaches that have already been tested by the courts. If such an approach had been taken in Brown v. Topeka Board of Education, that landmark case would never have been won. It was only through the creative and innovative approaches of the lawyers that the Supreme Court was moved to outlaw the established doctrine of "separate, but equal." Likewise, in Swann v. Charlotte-Mecklenburg, if plaintiffs had relied only on established means of desegregating the schools, that decision would never have called for the use of transportation to effectuate school desegregation. Thus, it is the nature of a civil rights practice to use creative and innovative, but sound, approaches to combat the persistent problem of discrimination that the law was designed to remedy.

The establishment of a $75 per hour maximum on court-awarded attorney's fees would mean the eventual end of effective private enforcement of civil rights laws. I know from my own experience that a law firm such as ours will be unable to carry the civil rights load that we presently carry and that we have carried over the years. In order to maintain a viable civil rights practice, we must be able to attract and keep competent lawyers specializing in the area. We cannot develop the required expertise by handling these cases on a sporadic basis. Only by doing a regular practice in the area have we been able to attract competent lawyers. At present, we have only one associate working primarily in the civil rights area with an hourly billing rate of $75. The partners of the firm who handle civil rights work have normal hourly rates ranging from $100 per hour to $150 per hour, depending on the nature and circumstances of the particular case. Most of our civil rights work requires the expertise and experiences of a partner, although associates offer needed support. This Bill would even require us to dispense with much of the use we have been able to make of paralegals and law students since their time would no longer be compensable. Thus, the cost of handling cases would go up rather than down.

The $75 per hour maximum rate under the proposed Bill is wholly unrealistic in light of what is required to run a law office. Our staff cannot take less than their regular salaries, regardless of whether they are working on a case against the government or against a private discriminator. Our landlord will not take less than full rent for the space we occupy working on government cases. We have yet to have a single bill collector offer a concession to us because we are litigating cases against the government and not against private discriminators. Our typewriters, word processors, and copies cost the same regardless of who the defendant is. Thus, from a point of view of law office economics, there is no justification for a $75 maximum for court-awarded attorneys fees in cases litigated against the government.

In some ways, it is ironic that the bill carves out a special niche for state, local or federal governments to make it cheaper for them to violate citizen's rights. Our governmental bodies owe a special obligation to treat its citizens without discrimination. Where a governmental body discriminates against a citizen because of his race or sex, I believe the governmental body should pay a penalty over and above what may be the out-of-pocket losses suffered by the innocent discriminatee. Doubling the damages or some other adequate penalty should be imposed on such violators of the law. Certainly, it is inappropriate to shelter such violators by limiting individuals access to the courts. In reality, the cost for litigating a case against a governmental entity is no less costly than litigating a case against a private civil rights violater. In many instances, it is more difficult and more costly to litigate against governmental units because often legal decisions are made not on the basis of the merits of a case, but on the basis of politics. In our experience, it has not been unusual for counsel for a governmental unit to recommend settlement, only to have that settlement rejected because the governmental unit determined that such a settlement was not politically acceptable. Often, the governmental unit or agency will take the position that it prefers to have a court impose a requirement rather than reach agreement. That way, they can blame the court in response to public criticism.

We have encountered several instances where the government has rejected a settlement offered before trial or judgment only to have the court enter an order after trial requiring the government to do more than it would have been required to do under the proposed settlement. Two examples come to mind. In one case, we represented black plaintiffs who had been discriminated against by the United States Postal Service. My partner who handled that case offered a settlement before trial which would have resulted in relief costing the government approximately a half million dollars. Counsel fees, of course, would have been limited to the work done up to that point. Rather than settle, the Government litigated the case through trial and appeal only to have the court grant greater relief than plaintiffs had initially proposed, costing the government in excess of two million dollars, plus counsel fees and costs for litigating the case through appeal.

In another case, involving the City of Shelby, North Carolina, my partners, representing a black Nigerian who was discriminated against on the job, offered to settle the case for a total of $7,500.00 while the jury was out. The City refused. The jury hung. Before retrial, we offered to settle for a total of $15,000.00. The City again refused. The jury returned a verdict of $135,000, including back pay. The City then filed every conceivable motion in an attempt to overturn the verdict. The case was eventually appealed. The City lost and we were awarded fees of $65,000 as a result of the City's insistence on litigating a case in the face of an offer that was considerably less than the value a local jury placed on the case.

Likewise, in the voting rights area which is very active these days, we have found it extremely difficult to get governmental units who are obviously in violation of Section 5 and Section 2 of the Voting Rights Act to agree to make meaningful change in their electoral systems without the necessity of litigation. In this politically sensitive area, the government almost routinely chooses to make change only as a result of litigation rather than negotiation. Without exception, in every instance where we have brought a case under the Voting Rights Act, the compensation paid to our opposing counsel is at least $100 per hour in those cases that we know about. In some cases, it is well above $100 per hour. It would be grossly unfair to limit us as plaintiffs' counsel to $75 per hour where we are running a risk of no recovery at all, or recovering less than the hours actually expended, and to allow counsel for the government to receive $100 per hour and upwards for every minute which they have spent on the case whether the case is won or lost.

Section 5(1) and 3(9) of the Bill allowing fees only where plaintiffs obtain significant relief would unduly and severely limit the number of persons who would be able to bring suit under the civil rights laws. Not all civil rights violations involve large sums of money or classwide practices. Nevertheless, the insults to human dignity and feelings of self-worth occasioned by such violations must be combatted on a case-by-case basis if the remedy is to be meaningful. But such cases can usually be resolved without great expenditure of time or resources in the absence of unreasonable recalcitrance on the part of defendants. Thus, the award of fees is likely to be commensurate with the result under law as it presently stands. In those cases presenting unusual circumstances, present law permits the courts to tailor the award of fees according to the results achieved. Thus, the effect of these sections of the Bill is not to eliminate fee disparity or to bring equity to the system, but simply to discourage the victims of governmental wrongdoing from enforcing their rights.

If the true objective of this Bill is to bring more uniformity, consistency and predictability to court-awarded fees, there are better and easier ways to do so than eliminating effective enforcement of rights. The Report of the Third Circuit Task Force dated October 8, 1985 provides some guidance by calling for a standarized fee schedule to be adopted on a district-by-district basis, based upon market rates for categories of attorneys or others who provide services. Such a schedule could be arrived at through the cooperation of the district judge, the local bar association and plaintiffs' and defendants' attorneys. This approach would be more equitable and would minimize litigation over the amount of fees awarded.

I would not oppose S.1580 so strongly if its only impact was to limit fees for lawyers. Vastly more important than its effect upon lawyers is the disastrous effect this Bill would have upon the legions of people whose civil rights have been and continue to be violated by governmental authorities who have little regard for the rights of others. I would gladly give up my civil rights practice if I could be sure that the rights of the impecunious victims would be protected and vindicated otherwise. No one can offer reasonably that assurance in the forseeable future.

No matter how committed we are as private practitioners, we cannot enforce these laws without adequate compensation. We need the continued hope of reasonable fee awards in order to continue our civil rights practices. The government, not the victims of unlawful governmental actions, should bear the responsibility for violating the rights of its citizens.

I therefore urge you not to report S.1580 out of this Subcommittee. Thank you.

Senator HATCH. Mr. Larson, we will turn to you.

STATEMENT OF E. RICHARD LARSON

Mr. LARSON. Mr. Chairman, thank you very much for the opportunity to appear before you.

Senator HATCH. We are glad to have you here.

Mr. LARSON. I am E. Richard Larson of the American Civil Liberties Union. I have submitted a statement, and also, provided to your counsel a chart that summarizes in shorter form our section-by-section analysis in the statement.

I would appreciate their both being made a part of the record.

Senator HATCH. Without objection, they will both be inserted in the record.

Mr. LARSON. Thank you.

I do want to address, in part, the section-by-section analysis as well as the chart in which I have summarized the specific sections of the law. The reason is that I believe that the Justice Department's section-by-section analysis, which accompanied the introduction of this legislation, is quite inaccurate and I think the record does need to be corrected.

Before going to some of the particular sections of S. 1580, let me make some preliminary observations.

First of all, virtually all civil rights enforcement is carried out in this country by private lawyers, such as Mr. Ferguson, such as Mr. Sunderland, such as Mr. McTeer who testified here last year, and such as Mr. Farrington who testified here several years ago.

In my view, S. 1580, the way it's drafted by the Justice Department, is designed to curtail civil rights enforcement if not, in most instances, bar civil rights enforcement. The bill, in fact, is nearly the equivalent of a repeal of the fee-shifting statutes which apply against the Federal, State, and local governments.

The bill proceeds under the guise of providing standards where none now exist. As we have demonstrated, I think in some detail in our statement, there are plenty of standards right now that were initially provided by Congress and they, indeed, have been implemented by the courts in hundreds upon hundreds of decisions.

What would be the result of a bill such as S. 1580? Well, not only would it deny fees against Government wrongdoers, but it of course would upset what has now become a matter of settled law. It would overrule nearly a dozen Supreme Court decisions and hundreds upon hundreds of other Federal court decisions.

Since it is not providing standards where none now exist, but instead providing new standards, the bill would invite massive new litigation in an area that is now fairly well settled as a matter of law.

The bill also—and on the bottom line, we believe—eviscerates the very purpose of fee-shifting statutes in the civil rights area, in the environmental area and in other areas. That purpose is to enable the victims of civil rights and other legal violations to sue and, thereby, to encourage the enforcement of our civil rights laws.

If we take fee-shifting away, we take away enforcement of our civil rights laws.

Let me make another preliminary observation with regard to Senator Grassley's comment at the outset with regard to any analogy supplied by the Equal Access to Justice Act. The purpose of the Equal Access to Justice Act, with its $75 cap on hourly rates, is not to encourage companies to sue the Federal Government.

Indeed, 85 percent of the litigation involving the Federal Government concerns Government regulation of private industry. Private companies, when they are involved in these lawsuits, already can write off as a matter of tax law their attorneys' fees.

The Equal Access to Justice Act provides them basically a second bite at the apple so that they can get some of their fees back. The Equal Access to Justice Act, unlike the fee-shifting statues in the civil rights area, is not designed to attract competent counsel to represent plaintiffs against Government wrongdoers.

It's a major distinction and I think it totally distinguishes the use of a $75 cap.

Senator HATCH. Thank you.

Mr. LARSON. Senator Hatch, if I may, I didn't get to my section-by-section analysis. It's a part of the record. But I have some additional comments.

I was out in the hall during part of this hearing talking with Chief Justice Peterson. We were somewhat hit by surprise with the fact that this appears to be a hearing on S. 1794 and S. 1795, bills that were introduced only yesterday; bills that I have not even seen. I don't think there has been any opportunity for anybody to comment on them.

Justice Peterson stated in his testimony that there had been no opposition to the bills. Well, the bills were introduced only yesterday.

Senator HATCH. We understand.

Mr. LARSON. We have not had an opportunity to analyze them. I would hope there would be separate hearings on those bills and that they not be included as part of S. 1580.

Senator HATCH. Well, let's do this. The bill was just introduced yesterday and I understand you have not had an opportunity of reviewing that bill. Of course, this legislation did address the *Pulliam* problem.

Now, you have had the opportunity of hearing the State and Federal judges that testified earlier. So what I will do is I will keep the record open.

Mr. LARSON. Senator, there will not be separate hearings on those bills that were introduced yesterday?

Senator HATCH. I don't intend to hold any separate hearings on that particular bill. I think it's pretty straightforward, it's pretty understandable.

We will keep this record open for submission of materials by you or anybody else who would care to do so on it.

If I find from the submission of those materials that another hearing is necessary, we will certainly not hesitate to consider that.

Mr. LARSON. If I may, Senator, I would like to make a couple of comments with regard to Judge Dillin's and Judge Peterson's comments?

Senator HATCH. Of course, please do.

Mr. LARSON. I would like to point out that in several of the cases they cite, particularly *Pulliam* itself and additionally *Morrison* v. *Ayoob,* in both of those cases the fees of course were paid by the State governments. They were not at all paid by the judges that had been sued.

Indeed, Justice Peterson knew, with regard to the fee award that was supposedly assessed against him, it was always the understanding that the State of Oregon would pay those fees. He has conceded such.

Senator HATCH. Yes, I think so.

Mr. LARSON. He also stated in the hall, and I think would candidly state to you, that he knows of no case in which a judge has personally paid fees. What we are talking about is civil rights enforcement against a government officer the same as administrative officials who also are sworn to uphold the Constitution; and, yet, they are held liable for fees—but in name, only.

It is the government entity that normally pays the fees.

I would say that the judicial immunity in this context is not relieving the judges of anything they don't already enjoy. It is relieving the State governments from paying the fees for the unconstitutional actions that are taken by government actors.

Now, the facts in the *Morrison* case, I think, are somewhat appalling. Here are several county and State judges that are routinely convicting and incarcerating indigent defendants without ever providing them a right to counsel.

The plaintiff's counsel, in *Morrison,* went to the judges, they went to a State judicial conference, they said, "Do something. Please do something to change this concededly unconstitutional practice."

Nothing was done until a lawsuit, some 6 or 8 months after negotiations had failed, was filed. Then the State said they would change the practice. That lawsuit was necessary to change a concededly unconstitutional practice and the fee award was paid by the State.

If there is any legitimate worry that fee awards will not be paid by the State, I would suggest that the remedy is not to immunize judges who, in any event, do not pay the fees; but the remedy would be for the State Conference of Chief Judges to do what they are doing, which is to make certain that indemnification statutes are passed by every State.

That is the better response.

Senator HATCH. We appreciate having that information.

[Statement follows:]

PREPARED STATEMENT OF E. RICHARD LARSON

Thank you for providing the opportunity for the ACLU to comment on S. 1580, a bill which is a slightly revised version of S. 2802, 98th Cong., 2d Sess. (1984). For reasons similiar to those on which we based our opposition during the last Congress to S. 2802,[1] we oppose S. 1580, and we urge that it not be reported out of this Subcommittee.

In this Statement, we address S. 1580 hereafter in three interrelated contexts. (1) First, we set forth infra at 5-10 a brief summary of the effects of the bill on the fee entitlement and fee computation standards previously established by Congress and currently a matter of settled law. (2) Second, and to the same effect, we provide infra at 10-77 a fairly detailed section-by-section analysis of the bill. (3) And third, we finally demonstrate infra at 77-82 how the bill repeatedly violates Congress' overriding purpose for enacting civil rights fee-shifting statutes: to attract lawyers to represent civil rights plaintiffs, and thereby to encourage the enforcement of our civil rights laws.

Initially, however, we believe we should state at the outset our primary reasons for opposing the bill. Our opposition to S. 1580 is essentially threefold.

First, the very premise of the bill -- that there are too few or no standards to guide the courts in awarding fees -- is simply invalid. In enacting the most frequently invoked of all fee-shifting statutes, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 [hereafter the "1976 Fees Act"], Congress, after extensive hearings and study, provided explicit and detailed guidelines both as to when fees should be awarded and as to the proper manner of fee computation. These detailed congressional standards have in fact been routinely followed by the courts, not only under the 1976 Fees Act, but also under most federal fee-shifting statutes, to the extent that there is now a considerable and quite precise body of law governing fee entitlement and fee computation.[2]

Second, even a cursory review of S. 1580 reveals that the actual purpose of the bill is not to provide standards where none now exist but instead to replace existing standards with substantial barriers to obtaining fees. These new barriers both would make it considerably more difficult for counsel who represent successful plaintiffs to obtain any fees whatsoever, and thereafter, for those civil rights lawyers who would be able to surmount these initial barriers, would severely decrease the amount of fees available. Putting aside for the moment the severe effect this would have on civil rights enforcement, this lessened liability for fees (much less no liability) on behalf of government agencies and officials would deter these law violators from feeling any need to settle cases and in fact would remove the very deterrence of government misconduct which fee awards provide.

Finally, our primary reason for opposing S. 1580 is that the bill, if enacted in whole or in part, would overwhelmingly discourage lawyers from representing the victims of civil rights violations, with the result that there would be little and perhaps no civil rights enforcement.[3/] Nothing could be further from the purposes underlying the enactment of the 1976 Fees Act and of similar fee-shifting statutes. In fact, as pointed out in Hensley v. Eckerhart, 461 U.S. 424 (1983): "The more obstacles that are placed in the path of [counsel for prevailing plaintiffs who] seek reasonable attorney's fees, the less likely lawyers will be able to undertake the risk of representing civil rights plaintiffs.... It may well become difficult for civil rights plaintiffs with less-than-certain prospects for success to obtain attorneys. That would be an anomalous result for judicial construction of a statute enacted 'to attract competent counsel in cases involving civil and constitutional rights.'" Id. at 456 (Brennan, J., concurring) (brackets and elipsis added) (citation to the House Report at 9 omitted). And it similarly would be an anomalous result in view of Congress' finding, in the Senate Report at 2, that "fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these [civil rights] laws contain."

I. A Summary of the Effects of S. 1580 on the Fee Entitlement and Fee Computation Standards Established by Congress

S. 1580 is exceedingly broad in its coverage and potentially devasting in its impact on Congress' fee standards and on current law. This legislation -- which would apply to virtually every federal fee-shifting statute which authorizes fees against federal, state, or local governments -- would significantly alter clearly expressed congressional standards and current law by limiting and often eliminating the fee entitlement of counsel for prevailing plaintiffs, by curtailing the amount of fees recoverable, and even by lessening and sometimes eliminating government fee liability in monetary cases. First, as to fee entitlement:

*** Section 5(1) and section 3(9) of the bill would set a high entitlement threshold by allowing fees only where plaintiffs obtain "significant relief;" whereas under current law civil rights lawyers are entitled to fees so long as the plaintiffs "vindicate their rights" or "obtain some of the benefit sought," and environmental lawyers are entitled to fees so long as the plaintiffs enjoy "some degree of success."

*** Section 5(1) and section 3(9) of the bill would eliminate fee entitlement where plaintiffs succeed in settled or mooted cases; whereas under current law lawyers are entitled to fees so long as plaintiffs vindicate rights or obtain some of the benefit sought in settled or mooted cases.

*** Section 5(1) and sections 3(9) and 3(10) of the bill would undermine interim fee entitlement in protracted litigation by requiring entry of a final judgment before fees could be awarded and by eliminating the possibility of fee awards following a preliminary injunction; whereas under current law interim fees may be awarded following any interim order which substantially determines the rights of the parties.

*** Section 4(d) of the bill would eliminate fee entitlement altogether against intervening defendants who support government actions and who did not violate plaintiffs' rights; whereas under current law counsel for prevailing plaintiffs are entitled to fees against losing intervening defendants whose very presence in litigation supplements government defense efforts and creates additional litigation burdens and expense for plaintiffs' counsel.

Second, as to the amount of fee compensation:

*** Section 5(2)(A) of the bill would allow fees only for time spent on procedural and substantive issues on which plaintiffs actually prevailed; whereas under current law plaintiffs' counsel are entitled to fees for all time spent on matters which are factually or legally related to the winning claims, and are entitled to fees for all time spent on a case which achieves excellent results.

*** Section 6(a) of the bill would place a $75 per hour ceiling on hourly rates and also would bar the use of upward adjustments of the hours-times-rates lodestar even in cases involving extraordinary contingency risks, long delays in payment, and achievement of excellent results; whereas under current law counsel are entitled to market-based hourly rates and to market-based upward adjustments so as to provide a reasonable fee.

*** Section 6(b)(1)(B) of the bill would invite a further reduction of hourly rates for salaried public interest attorneys and for law firm associates based upon their hourly salaries; whereas under current law counsel are entitled to fees based on market rates or actual billing rates.

*** Section 6(b)(2)(A) of the bill would invite downward adjustments of the hours-times-rates lodestar relative to the monetary result or the "value" of the injunctive relief achieved; whereas under current law downward adjustments may be used only in isolated circumstances.

*** Section 3(1) of the bill would exclude altogether any market rate compensation for time expended by law students; whereas under current law time spent by law students which would otherwise be spent by counsel is compensable at market rates.

Finally, as to the source of fee awards for counsel in monetary cases:

*** Section 6(c) of the bill would require that the initial source of counsel fees be the plaintiffs' actual monetary recovery (up to 25% of that monetary recovery), with the result that the fee liability of government wrongdoers would be lessened and in some cases eliminated at the expense of the victims of the government wrongdoers; whereas under current law a government wrongdoer is liable for the entire fee award.

These extraordinary changes in current law highlight only a few of the many ways that S. 1580 would devastatingly alter the fee entitlement and fee computation standards established by Congress and thoroughly implemented by the courts.

II. A Section-by-Section Analysis of S. 1580 and of its Effect on the Fee Entitlement and Fee Computation Standards Established by Congress

Accompanying the introduction of S. 1580 was a transmittal letter from the Department of Justice with an attached Section-by-Section Analysis. See 131 Cong. Rec. S10878-84 (daily ed. Aug. 1, 1985). In this portion of our Statement we provide our own section-by-section analysis of many of the sections of S. 1580, an analysis which, we submit, is considerably more accurate than the Justice Department's Section-by-Section Analysis.[4] For example, although the Justice Department never once refers to the specific standards and guidelines already provided by Congress particularly in enacting the 1976 Fees Act, we make ample reference hereafter to Congress' guidance. And although the Justice Department nowhere reveals that S. 1580 would overturn hundreds of court decisions implementing Congress' specific guidance, we point out hereafter that S. 1580 would in fact overrule hundreds of such court decisions and would also overrule such Supreme Court decisions as Blum v. Stenson, 79 L.Ed.2d 891 (1984) (market-based hourly rates); Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) (fee entitlement standard in environmental cases); Hensley v. Eckerhart, 461 U.S. 424 (1983) (compensable hours in cases in which plaintiffs advance separate claims for relief); and Maher v. Gagne, 448 U.S. 122 (1980) (fee entitlement in settled cases).

In this section-by-section analysis, we do not analyze each section and subsection of the bill in order.[5] Rather our analysis of some but not all sections and subsections is set forth under the following headings: (a) findings and purpose; (b) fee entitlement; (c) fee computation; and (d) government fee liability.

A. Findings and Purpose

Sections 2(a)(2) and 2(a)(3) of the bill essentially denigrate Congress' alleged "failure to provide standards to guide courts ... in awarding ... fees."

The Justice Department compounds this accusation in its Section-by-Section Analysis of section 2 by stating that federal fee-shifting "statutes have put a great burden on the courts because, for the most part, Congress has provided no guidance as to when an award of attorney's fees is appropriate or as to what constitutes a reasonable award."[6] The Justice Department thus would have you believe that the purpose of S. 1580 is simply to cure this perceived ill: "The purpose of the bill is to have Congress provide greater guidance to the courts ... for the award of attorneys' fees."

Contrary to the so-called findings in section 2(a), and contrary to the Justice Department's erroneous accusations, Congress in fact already has provided extensive and explicit guidance both as to the standards for determining fee entitlement and as to the standards for determining fee computation. This extensive guidance is most thoroughly set forth in the Senate and House Reports accompanying the 1976 Fees act, 42 U.S.C. § 1988, the fee-shifting statute most frequently invoked in litigation against state and local government defendants, and in fact the most frequently invoked fee-shifting statute period.

Several points about the extensive congressional guidance provided in the Senate and House Reports are particularly pertinent here.

First, the extensive congressional guidance is indeed extensive. Dozens upon dozens of legal issues are raised and resolved in that legislative history through express direction, explicit standards, and illustrative cases cited and quoted from with approval. In fact, Congress made clear at the time that it "intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing [the 1976 Fees Act]." House Report at 8; see also Senate Report at 4. Lest there be any doubt about this extensive guidance, the Senate Report and the House Report should themselves be examined.[7]

Second, the extensive congressional guidance set forth in that legislative history has been and continues to be routinely deferred to and relied on by the courts in making determinations about fee entitlement and fee computation. Illustrative are the seven Supreme Court decisions cited supra at 2-3 n.2, decisions in which the Supreme Court affirmed lower court fee determinations against the losing defendants-petitioners based on Congress' explicit guidance. And, what is routine in the Supreme Court is commonplace among the lower courts.

Third, although not all fee-shifting statutes enacted prior to the 1976 Fees Act are accompanied by congressional guidance as extensive as that provided in the Senate and House Reports accompanying the 1976 Fees Act, the courts nevertheless are so well acquainted with the congressional guidance accompanying the 1976 Fees Act that they often apply that guidance under similar fee-shifting statutes.[8] For example, in addressing a fee issue under the fee-shifting provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), the Supreme Court in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70-71 n.9 (1980), quickly disposed of the issue in a footnote by relying on the congressional guidance provided in the House Report accompanying the 1976 Fees act, which the Court noted "is legislation similar in purpose and design to Title VII's fee provision."[9] This form of reliance on Congress' guidance also is commonplace among the lower courts. Illustrative is Seals v. Quarterly County Court of

Madison County, Tennessee, 562 F.2d 390 (6th Cir. 1977), a case in which the Sixth Circuit faced a fee issue under the fee-shifting provision of the Voting Rights Act, 42 U.S.C. § 1973*l*(e). After examining the legislative history of both the Voting Rights Act and of the 1976 Fees Act, the Sixth Circuit pointed out that although the legislative history of the Voting Rights Act did not appear to address the matter at issue, "[w]hat is missing in this regard under the 1975 Voting Rights Act is unmistakably available under the legislative history of The Civil Rights Attorney's Fees Awards Act of 1976." 562 F.2d at 393. The Sixth Circuit thus referred to and quoted from the relevant passages in the House Report accompanying the 1976 Fees Act, and held that "the language quoted above appears to us to be a clear-cut indication that Congress considered the exact problem with which we are now confronted and provided an express indication as to how the general language of the 1976 statute was intended to be applied. Under such a circumstance (relatively rare in this court's experience), we, of course, follow congressional intent." *Id*. at 394, *quoted with approval and applied in Northcross v. Board of Education of Memphis*, 611 F.2d 624, 633 (6th Cir. 1979), *cert*. *denied*, 447 U.S. 911 (1980).

Fourth, Congress' guidance is not only well know and routinely applied by the courts, but it quite evidently is well known and often applied by Congress itself. In fact, it is not at all uncommon for Congress, when enacting a new fee-shifting statute, simply to incorporate its previous legislative guidance into the new statute. For example, when Congress in 1978 enacted the fee-shifting provision in § 505(b) of the Rehabilitation Act, 29 U.S.C. § 794a(b), Congress left no doubt that "[t]he legislative history and expressions of legislative intent with respect to [the Civil Rights Attorney's Fees Awards Act of 1976,] Public Law 94-559, are applicable to the new section 505(b)." 124 Cong. Rec. 30346, 30347 (1978) (remarks of Senator Cranston, the author of § 505(b)); *see also*, *e.g.*, *id*. at 37508 (remarks of Senator Stafford).

Finally, despite the obviously extensive guidance already provided by Congress, despite the courts' nearly routine reliance on that extensive congressional guidance, and despite Congress' occasional reassertion and incorporation of that extensive guidance, the Justice Department authors of S. 1580 pretend and apparently want you to believe that the emperor has no clothes.

What is apparent from all of this is, among other things, that the purpose of S. 1580 is not to provide congressional guidance where none now exists, as is erroneously stated in the Justice Department's Section-by-Section Analysis.

Instead, as we summarized earlier and explain in greater detail hereafter, the purpose of S. 1580 is not only to replace Congress' already-existent extensive guidance with new barriers, but more perniciously to use these new barriers to discourage the enforcement of our nation's civil rights laws by limiting and often eliminating fee entitlement altogether for counsel who represent successful plaintiffs and by severely limiting the amount of fees to which counsel would otherwise be entitled. Enactment of a bill such as S. 1580 would unquestionably achieve this intended purpose, while at the same time overruling hundreds of court decisions faithfully implementing Congress' already extensive guidance.

B. Fee Entitlement

Various sections of the bill would fundamentally and pervasively alter the basic standards of fee entitlement previously established by Congress. Among the proposed changes in current law are four basic changes: (1) the threshold standards for fee entitlement would be significantly raised so as to make it significantly more difficult, and often impossible, for counsel who represent successful plaintiffs to be eligible for fees; (2) the threshold standards would make it virtually impossible for counsel who represent successful plaintiffs to recover fees in settled cases and in mooted cases; (3) interim fee awards, even in protracted litigation, would generally be barred; and (4) fee awards against intervenors, whose intervention multiply the proceedings and expenses for plaintiffs' counsel, would be barred.

1. Threshold Entitlement Standards

Section 5(1) of the bill conditions eligibility for fees upon counsel's establishing that the plaintiff has "prevailed on the merits," and section 3(9) of the bill defines prevailing on the merits to mean "having obtained a final decision in which the party has succeeded on a significant issue or issues in the controversy and obtained significant relief in connection with that issue or issues." Stated otherwise, for a plaintiff to prevail on the merits sufficient to invoke fee entitlement under new section 5(1), a plaintiff would have to satisfy a three-part test under new section 3(9): the plaintiff would have to obtain a "final decision," succeed on a "significant issue" in controversy, and obtain "significant relief."

The Justice Department in its Section-by-Section Analysis concedes that this new language -- particularly the requirement of obtaining "significant relief" -- would change two of the entitlement standards under current law. But the Justice Department does not explain that its new language in fact would, inter alia, require an extraordinary departure from the prevailing vindication of rights standard established by Congress.

First, as recognized by the Justice Department, the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 (1983), approved as "[a] typical formulation" in litigated civil rights cases, a threshold entitlement standard under which "'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" Id. at 433, quoting from Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978). Through the new language in section 3(9) of the bill, the Justice Department wants Congress to enact into law the first part of this standard (success on a significant issue) even though it is wholly inappropriate in settled and mooted cases;[10] and at the same time the Justice Department seeks to replace the second part of this standard (achievement of some of the benefit sought) by requiring plaintiffs to obtain "significant relief" as a threshold condition of fee entitlement.

As to the second part of this new standard, not only does the Justice Department implicitly concede that it wants Congress to impose an incredibly high entitlement threshold and thus to overrule Hensley, but the Justice Department even illustrates its impossibly high threshold by finding to be not sufficiently "significant" the across-the-board injunctive relief barring sex discrimination and the double back pay award totalling nearly $50 million obtained by the plaintiffs in Laffey v. Northwest Airlines, Inc.[11] Since few plaintiffs obtain relief as extensive as that won in Laffey -- relief deemed not sufficiently significant by the Justice Department -- few if any plaintiffs could obtain "significant relief" under the Justice Department's formulation, and few if any lawyers for successful plaintiffs thus would ever be entitled to fees.

Second, as also recognized by the Justice Department, it seeks the overruling not only of Hensley, but also of Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983). In Ruckelshaus, the Supreme Court explicitly held that counsel for plaintiffs in cases brought under the Clean Air Act, as well as under sixteen other environmental statutes,[12] were entitled to fees so long as the plaintiffs obtained simply "some degree of success." Id. at 694. Seeking the elimination of this threshold entitlement standard, the Justice Department through new section 3(9) would condition fee entitlement in environmental cases upon plaintiffs obtaining a final decision, succeeding on a significant issue, and obtaining significant relief. Again, few if any plaintiffs could reach this statutory threshold and few if any lawyers for prevailing plaintiffs thus would be eligible for fees.

Finally, and not at all mentioned in its Section-by-Section Analysis, the Justice Department seeks through new section 3(9) to bury entirely the basic vindication of rights standard which provided the premise for Congress' enactment of the 1976 Fees Act and of similar fee-shifting statutes. Through this threshold entitlement standard, as amply illustrated in the Senate and House Reports accompanying the 1976 Fees Act, the scope of the monetary or injunctive relief obtained by plaintiffs is irrelevant to the matter of fee entitlement. Instead, Congress fully intended counsel for civil rights plaintiffs to be entitled to fees where plaintiffs vindicate their rights.

The necessity for employing this vindication of rights standard was referred to by Congress at the outset of the Senate Report at 2: "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." Congress added meaning to this threshold standard in two different contexts of illustrative cases.

Through the Senate Report, Congress left no doubt that in order to be deemed prevailing parties for fee entitlement purposes, plaintiffs:

> may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (2d Cir. 1975), and cases cited therein; *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969); *Thomas v. Honeybrook Mines, Inc.*, 4[illegible] F.2d 981 (3d Cir. 1970); *Aspira of New York, Inc. v. Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975).

Id. at 5; *see also* House Report at 7. Illustrative of Congress' intent is the first-cited case, *Kopet v. Esquire Realty Co.*, 523 F.2d 1005, 1008 (2d Cir. 1975), where a plaintiff, who won a partial summary judgment motion on liability in a securities case, but who won no relief, was held entitled to fees for "vindicating the statutory policy against unregistered offerings." Equally dramatic in illustrating the vindication of rights test is *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970), an employment discrimination class action in which the plaintiff established a past violation of the law, won no individual relief, won no class relief, but nevertheless was entitled to fees for furthering the statutory policy of Title VII. Similarly, in Richards v. Griffith Rubber Mills, 300 F. Supp. 338, 341 (D. Ore. 1969), plaintiff proved a past violation of the law, won no individual relief, won no class relief, and was held to be a prevailing party entitled to fees. In Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir. 1970), cert. denied, 401 U.S. 911 (1971), there is no doubt that the pension fund trustee plaintiffs won substantial relief through judgments and settlements recovering delinquent pension contributions from coal company defendants, but the fee issue in Thomas was whether a separate coal miners' committee which had caused the trustee plaintiffs to sue was entitled to fees. As the court of appeals explained, even though the committee's earlier litigation had been dismissed on procedural grounds, that litigation had caused the trustee plaintiffs to file their successful suit in which the coal miners' committee intervened, and the committee's action thus entitled them to fees for vindicating the miners' rights. Finally, in ASPIRA of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975), a bilingual education case in which the plaintiffs achieved through a consent decree most of the relief they had sought, plaintiffs were held entitled to fees for vindicating their rights quite apart from defendants' contributions to the consent decree.

Relying on additional illustrative cases, Congress also observed, again through the Senate Report at 5, that:

> Fee awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. See Bradley, supra; Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

See also House Report at 8. As both Bradley and Mills demonstrate, plaintiffs need only to vindicate their rights to be deemed prevailing parties for fee entitlement purposes.

At issue on the merits in Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974), a school desegregation case, was both plaintiffs' entitlement to a broader desegregation remedy and the appropriate scope of the broader remedy. On the first issue, plaintiffs won a court ruling that they were entitled to a broader remedy; but as to the scope of the remedy, plaintiffs' proposed desegregation plan was rejected, and defendants' lesser plan was approved. Id. at 701-04. On the facts, plaintiffs were found to have sufficiently prevailed on an important matter so as to be entitled to fees.

Arguably even less success, in fact no relief on the merits, was obtained by the plaintiffs in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). In Mills, a stockholders derivative action challenging a defective proxy statement, plaintiffs "established their cause of action" and they "established a violation of the securities laws," but they won no equitable relief and they won no damages. Id. at 389. Nevertheless, they were deemed to have prevailed and were thus entitled to fees. Id. at 389-96.

The foregoing congressional standards authorizing fees where plaintiffs vindicate their rights, have been widely recognized and applied by the federal courts in literally hundreds of cases. Illustrative -- and often identical to the illustrative cases relied on by Congress -- are cases in which government defendants were found to have violated the law, although only little or no injunctive relief was available;[13/] cases in which government defendants were found to have violated plaintiffs' constitutional rights, although only nominal damages were able to be recovered;[14/] and cases in which government defendants either settled cases favorably to plaintiffs or mooted cases, with the result that plaintiffs vindicated their rights without ever obtaining a final decision in their favor, without formally prevailing on a significant issue, or without even necessarily obtaining any formal relief.[15/]

In proposing its new standards in section 3(9), the Justice Department nowhere indicates that it is seeking both the repeal of Congress' vindication of rights test and also the overruling of hundreds of court decisions. The Justice Department accordingly nowhere reveals the enormous distance between Congress' entitlement standards and the Justice Department's proposed entitlement standards in new section 3(9), under which there would be no fee entitlement even where plaintiffs as in Laffey win wide-ranging injunctive relief plus nearly $50 million in back pay.

2. Threshold Entitlement Standards in Settled or Mooted Cases

As previously noted, section 5(1) of the bill conditions eligibility for fees upon counsel's establishing that the plaintiff has "prevailed on the merits," and section 3(9) of the bill defines prevailing on the merits to mean "having obtained a final decision in which the party has succeeded on a signifcant issue or issues in the controvery and obtained significant relief in connection with that issue or issues." That this three-part test set forth in section 3(9) -- obtaining a final decision, succeeding on a significant issue, and obtaining significant relief -- would apply in all contexts, including in settled and mooted cases, is made clear by sections 4(a) and 4(b). Particularly relevant is section 4(b) which emphatically states that "no award of attorneys' fees" shall be made against the United States or against state or local governments "except as authorized by law ... and in accordance with the provisions of this Act."

In its Section-by-Secton Analysis, the Justice Department does not mention that the combination of the foregoing new sections would effectively bar fee entitlement for plaintiffs' counsel in cases which are settled or mooted favorably to plaintiffs.[16] Nor of course does the Justice Department mention that application of the three-part test in new section 3(9) to settled and mooted cases would totally eviscerate Congress' standards would overrule dozens and possibly hundreds of court decisions applying Congress' standards, and would even overrule the Supreme Court's decision in Maher v. Gagne, 448 U.S. 1 (1980) (counsel are entitled to fees where plaintiffs essentially prevail through a consent decree).

Before turning to Congress' standards and to settled case law -- both of which would be overturned under new section 3(9) -- we believe it would be useful to explain why new section 3(9) would effectively bar fees in settled and mooted cases simply in a practical sense.

Mooted cases, including those where defendants respond to lawsuits by providing plaintiffs with all of the benefits sought, share one basic factor in common: because there no longer are live controversies in cases which are mooted, plaintiffs' cases are dismissed and final judgments are entered against them. Given this state of affairs, counsel for a successful plaintiff in a mooted case would not be able to obtain fees since the three-part entitlement test in new section 3(9) could never be satisfied. First, and most basically, fee entitlement would be defeated because the plaintiff never "obtained a final decision" but instead suffered entry of an adverse judgment. Even if this barrier to fee entitlement could be surmounted -- and it could not be -- the other two parts of the three-part test could not be satisfied since the plaintiff could not necessarily be said to have "succeeded on a significant issue" in controversy, nor could the plaintiff be said to have obtained "significant relief in connection with that issue" because the successful plaintiff in fact received no formal relief at all.

Out-of-court settlements, including those which provide significant or even phenomenal benefits beyond those sought by a plaintiff, would be met by the same fate since they too share several defeating elements: they always contain disclaimers by defendants of any liability or wrongdoing; they often are reached without any court involvement whatsoever; and they end the litigation with the plaintiffs dismissing the case. Given these realities, counsel for a successful plaintiff who obtained tremendous benefits through an out-of-court settlement would not be entitled to fees under new section 3(9) since the three-part entitlement test again could not be satisfied. First, it could not be said that the plaintiff "obtained a final decision" since the plaintiff in fact obtained no decision at all but instead dismissed the case. This of course would be sufficient, in and of itself, to bar fee entitlement under new section 3(9). Second, it also could not be said that the plaintiff had "succeeded on a significant issue" because the court may never have ruled on any matter in controversy and hence could never have accorded plaintiff any success, and also because the defendant ultimately disclaimed not only liability but also wrongdoing. Third, the successful plaintiff finally could not be said to have obtained "significant relief" since the plaintiff in fact received no formal relief at all.

Section 3(9), as drafted by its Justice Department authors, thus would as a practical matter bar fee entitlement in settled and mooted cases. This result is absolutely contrary to Congress' standards and also absolutely contrary to the many federal court decisions implementing those standards.

In enacting the 1976 Fees Act, Congress left no doubt that plaintiffs who vindicate their rights through a consent decree, through an out-of-court settlement, through a case which is mooted, or by otherwise obtaining no formal relief are to be considered pervailing parties. As Congress observed in the Senate Report, in the context of discussing prevailing plaintiffs:

> Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. Kopet v. Esquire Realty Co., 523 F.2d 1005 (2d Cir. 1975), and cases cited therein; Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969); Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir. 1970); Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975).

Id. at 5. Similar although even more extensive standards were imposed through the House Report at 7, also in the context of discussing prevailing plaintiffs:

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974); Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976); Aspira of New York Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975). A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed. E.g., Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982 (1972); see also Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971).

Illustrative of Congress' standards, authorizing fees in settled and mooted cases are the foregoing cases cited with approval and relied on in the Senate and House Reports. In the context of mooted cases, the seminal case establishing fee entitlement where a plaintiff's lawsuit serves as a catalyst to bring about sought-after changes is Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970), an employment discrimination lawsuit under Title VII. Although plaintiff Parham established that the defendant had violated Title VII through its discrimination against blacks applicants, plaintiff won no injunctive relief in view of the defendant's "tremendous progress in the hiring of black employees ... progress [which] followed, not preceded, Parham's complaint to the EEOC and his subsequent institution of this lawsuit." Id. at 429. Nevertheless, plaintiff Parham was sufficiently successful for purposes of fee entitlement because, as the court explained, "[a]lthough we find no injunction warranted here, we believe Parham's lawsuit acted as a catalyst which prompted the [defendant] to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII." Id. at 429-30.

Relying on Congress' rather explicit intent, and initially on Parham as well, the federal courts have generally approved fee entitlement where plaintiffs vindicated their rights through defendants' provision of some of the benefits sought at least so long as plaintiffs' lawsuits were catalysts which prompted the provision of the benefits.[17/]

In the context of settled cases -- counsel for plaintiffs "should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion," House Report at 7 -- Congress illustrated its standards by citing with approval and relying on three caes in which fee entitlement flowed from plaintiffs' success in settlement. In Incarcerated Men of Allen County v. Fair, 507 F.2d 281, 285-86 (6th Cir 1974), aff'g 376 F. Supp. 483, 485 (N.D. Ohio 1973), a jail conditions suit in which plaintiffs won through two consent orders improved conditions of confinement for current and future inmates of the county jail, fee entitlement was upheld on the ground that plaintiffs had vindicated their rights. Similarly, in Parker v. Matthews, 411 F. Supp. 1059, 1061-65 (D.D.C. 1976), aff'd sub nom., Parker v.

Califano, 561 F.2d 320 (D.C. Cir. 1977), a Title VII case settled out of court, fees were allowed since defendant provided the sought-after promotion only after the lawsuit was filed. And in ASPIRA of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541, 542-43 (S.D.N.Y. 1975), a bilingual education lawsuit which ended in a consent decree providing plaintiffs with the benefits sought, fees were allowed since defendants provided the benefits only after first vigorously opposing plaintiffs' lawsuit.

Based on Congress' standards authorizing fees in settled cases, the federal courts have widely approved fee entitlement where plaintiffs vindicated their rights through defendants' provision of some of the benefits sought by the plaintiffs.[18/] In fact, Congress' standards were followed and applied by the Supreme Court in Maher v. Gagne, 448 U.S. 122, 127, 129-30 (1980), aff'g 594 F.2d 336, 339-41 (2d Cir. 1979), a case in which fee entitlement under the 1976 Fees Act was upheld based upon a consent decree in which plaintiff, while not prevailing in every particular, obtained substantially all of the benefits sought in her complaint. In response to the argument made by the government defendants -- that plaintiffs cannot prevail through a consent decree -- the Supreme Court pointed out that Congress through "the Senate Report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.'" 448 U.S. at 129 (citation omitted).

The Justice Department, primarily through new section 3(9) of the bill, seeks to repeal Congress' authorization of fees where plaintiffs prevail in settled or mooted cases, and also seeks to overturn numerous court decisions including the Supreme Court's decision in Maher implementing Congress'standards. In place of these well considered congressional standards and well settled decisional law, the Justice Department seeks to impose a three-part test which as a practical matter cannot be satisfied by plaintiffs who gain success through settled or mooted cases, and which as a practical matter means that counsel for successful plaintiffs will not be eligible for fees.

3. Interim Fees

The three-part fee entitlement test set forth in new section 3(9), which must be satisfied as a precondition to fee entitlement under new section 5(1) and which applies in all contexts under new sections 4(a) and 4(b), would effectively bar all interim fee awards.

To reiterate, for a plaintiff to satisfy the three-part test under new section 3(9), a plaintiff would have to first, obtain a "final decision;" second, succeed on a "significant issue" in controversy; and third, obtain "significant relief." The applicability of these criteria as a prerequisite to fee entitlement under new section 5(1), in all contexts under new sections 4(a) and 4(b), would effectively bar all interim fee awards.

As may be expected by now, the Justice Department in its Section-by-Section Analysis nowhere mentions that new section 3(9), in combination with the other new sections, would severely contravene Congress' standards, would overrule numerous federal court decisions, and would effectively kill all interim fee awards.[19]

Congress' standards, in fact, are directly contrary to the result now sought by the Justice Department. As Congress explained through the Senate Report at 5:

> In appropriate circumstances, counsel fees under [the 1976 Fees Act] may be awarded pendente lite. See Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974). Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. See Bradley, supra; Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

The same directive, authorizing interim fee awards, was stated somewhat more expansively in the House Report at 8:

> Furthermore, the word "prevailing" is not intended to require the entry of a final order before fees may be recovered. "A district court must have discretion to award fees and costs incident to the final disposition of interim matters." Bradley v. Richmond School Board, 416 U.S. 696, 723 (1974); see also Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). Such awards pendente lite are particularly important in protracted litigation, where it is difficult to predict with any certainty the date upon which a final order will be entered. While the courts have not yet formulated precise standards as to the appropriate circumstances under which such interim awards should be made, the Supreme Court has suggested some guidelines. "(T)he entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees...." Bradley v. Richmond School Board, supra at 722 n.28.

Congress' reliance on Bradley and Mills is particularly instructive. As pointed out supra at 23-24, the Supreme Court in Bradley allowed fees where plaintiffs had succeeded in obtaining a slightly broader remedy in the midst of ongoing litigation; and in Mills the Supreme Court recognized the propriety of awarding fees where plaintiffs had established liability but had not yet won any relief. As the Supreme Court pointed out in Bradley, the justification for the allowance of interim fees in such cases is obvious: "To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel and discourage the institution of actions despite the clear congressional intent to the contrary." 416 U.S. at 723.

Pursuant to Congress' direction, and consistent with Bradley and Mills, the federal courts have correctly allowed interim fees where plaintiffs have obtained some relief on the merits such as through a preliminary injunction, see, e.g., Deerfield Medical Center v. Deerfield Beach, 661 F.2d 328, 339 (5th Cir. 1981);[20] and have also correctly allowed interim fees where the plaintiffs in protracted litigation have at least established liability, see, e.g., James v. Stockham Valves and Fittings Co., 559 F.2d 310, 358-59 (5th Cir. 1977). Reminiscent of the Supreme Court's admonition in Bradley, the Fifth Circuit in James pointed out that an "award of interim attorneys' fees will prevent extreme cash-flow problems for plaintiffs and their attorneys," that without interim fees plaintiffs' counsel "will be discouraged from bringing such suits because of the risks of protracted litigation and the extended financial drain represented by such a risk," and that the failure to allow interim fees invites the "danger" that defense counsel "may be tempted to seek victory through an economic war of attrition against the plaintiffs." Id. (footnote omitted).[21]

The Justice Department, aware of the fact that government defendants are represented by government lawyers who take home biweekly paychecks, or by highly paid outside counsel who bill monthly, apparently seeks an economic war of attrition against plaintiffs and their counsel. Under the Justice Department's formulation in new section 3(9), none of the counsel for the successful plaintiffs in the foregoing cases would have been eligible for interim fees because none of the plaintiffs could have satisfied all three elements of the three-part test in new section 3(9).

Contrary to Congress' standards and settled law, there no longer should be any entitlement to interim fees, at least according to the Justice Department.

4. **Fee Awards Against Intervenors**

Section 4(d) of the bill would bar fee awards against parties who intervene in lawsuits to defend government action. The entirety of new section 4(d) states:

> No award of attorneys' fees or related expenses shall be made under a federal fee-shifting statute against a party who has intervened to defend the validity of a law or action of the United States, or a state or local government, and who has not been found to have violated a constitutional or statutory right of the party seeking the award.

In its Section-by-Section Analysis, the Justice Department does no more than to paraphrase and to reiterate the language of new section 4(d), and to assert its view that intervenor-defendants should not be liable for fees apparently no matter how much such intervenors multiply the proceedings and no matter how much time and expense are incurred by plaintiffs' counsel in response to the litigation activities of such intervenors.

What the Justice Department fails to explain is that nothing in the language of the 1976 Fees Act or in the standards provided by Congress supports the notion that losing intervenor-defendants should somehow be relieved of fee liability. Nor is there anything in the language of the 1976 Fees Act or in Congress' standards that supports the notion that only those defendants (or intervenor-defendants) who actually violate plaintiffs' rights can be held liable for fees. To the contrary, both the statute itself and Congress' standards leave little doubt that fee entitlement follows once a plaintiff is deemed the "prevailing party" no matter whom the plaintiff prevailed against. Moreover, as Congress directed through the Senate Report: "In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee paying client, 'for all time reasonably expended on a matter.'" Id. at 6 (citations omitted).

Consistent with Congress' standards, the federal courts have routinely assessed fees against losing defendants who have not actually violated plaintiffs' rights, such as where plaintiffs successfully challenge an unconstitutional law which had not yet gone into effect,[22] or where the successful plaintiffs were parents whose own rights had not been violated.[23] So long as plaintiffs prevail, losing defendants are, as Congress explained, liable for fees; by the same logic, so too are losing intervenor-defendants liable for fees.

Intervenor-defendants, as is obvious, do not intervene so as to become mere bystanders; instead, they ordinarily litigate actively, thereby increasing the burdens and expenses imposed on counsel for prevailing plaintiffs. As described by a court in a recent race discrimination case, "once the unions intervened as defendants they placed themselves in a position to prevent plaintiffs from obtaining relief. Then, they litigated vigorously in an attempt to deny plaintiffs various aspects of the relief that plaintiffs sought;" as such, "[t]heir efforts imposed substantial costs upon plaintiffs." Vulcan Society of Westchester County v. Fire Department of the City of White Plains, 533 F. Supp. 1054, 1062 (S.D.N.Y. 1982). Intervenor-defendants in fact often litigate more vigorously than the named defendants. For example, in another recent case:

> They [the intervenor-defendants] filed nearly 40 documents in the case, including at least 14 to which plaintiffs had to independently respond. Intervenor-defendants took an active role at trial, occasionally requiring the Court to stop their inquiry into areas beyond the permitted scope of intervention. On appeal, intervenor-defendants challenged the district court decision, and fully participated in the proceedings at the Court of Appeals. They also unsuccessfully petitioned the United States Supreme Court for a writ of certiorari and filed briefs in the consolidated appeals of the other parties. Counsel for the intervenor-defendants ultimately

argued this case before the Supreme Court on behalf of the city-defendants.

Akron Center for Reproductive Health v. Akron, 604 F. Supp. 1268, 1272 (N.D. Ohio 1984). In view of their litigation posture, losing intervenor-defendants are routinely held liable for fees and are assessed their proportionate share.[24/]

Not only do intervenor-defendants often litigate more vigorously than the initial defendants, but they sometimes act separately and alone in support of unlawful government action. Losing intervenor-defendants accordingly have been held liable for fees when they litigate independently in remedial proceedings, Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979); as well as when they alone appeal unsuccesfully, Moten v. Bricklayers International Union, 543 F.2d 224 (D.C. Cir. 1976). And, as the court recognized in May v. Cooperman, 578 F. Supp. 1308 (D.N.J. 1984), losing intervenor-defendants of course are liable for an entire fee award when they take over the entire effort to defend a concededly unconstitutional state statute.

The Justice Department's proposal once again contravenes both Congress' standards and well settled law.

C. Fee Computation

As a result of the foregoing provisions of S. 1580, counsel for successful plaintiffs would rarely be entitled to fees. Yet, even for those few lawyers for successful plaintiffs who actually might be able to surmount the new barriers to fee entitlement in S. 1580, their entitlement would be not to "reasonable" market-based fees as Congress provided for. Instead, under various sections of S. 1580 severely limiting the amount of fees available, counsel could recover only unreasonably low fees.

Among the fee computation standards previously dictated by Congress and now a matter of settled law which would be reversed by various sections of S. 1580 are the following: (1) counsel no longer would be entitled to compensation for most of the hours reasonably expended, but instead would be compensated only for time spent on specific procedural and substantive issues on which plaintiffs actually prevailed; (2) counsel no longer would be entitled to be compensated at market-based hourly rates, but instead would be subject to an hourly rate ceiling of $75 per hour in all cases; (3) salaried public interest attorneys and law firm associates no longer would be entitled to be compensated at market-based hourly rates, but instead would be subject to further rate reductions under impossible-to-calculate cost-based formulae; (4) counsel no longer would be entitled to market-based compensation for time expended by law students and paralegals, but instead would be denied all compensation for all such time; and (5) counsel no longer would be eligible for upward adjustments of hourly rates or of the hours-times-rates lodestar in difficult or protracted cases, but instead would be barred from receiving upward adjustments, while they ironically would be subject to downward adjustments relative to the monetary or injunctive relief won by plaintiffs.

Before examining each of these severe departures from the allowance of market-based compensation as dictated by Congress, we believe that it may be useful first to summarize Congress' standards under the 1976 Fees Act. These standards of course are nowhere mentioned by the Justice Department in its Section-by-Section Analysis.

Congress' basic standards -- to allow reasonable market-based compensation so as to attract lawyers to represent civil rights plaintiffs -- are initially set forth in the Senate Report:

> It is intended that the amount of fees awarded under [the 1976 Fees Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature.

Id. at 6. This same comparison with fee compensation in antitrust cases is made in the House Report at 8-9 (footnote omitted):

> Of course, it should be noted that the mere recovery of damages should not preclude the awarding of counsel fees. Under the anti-trust laws, for example, a plaintiff may recover treble damages and still the court is required to award attorney fees. The same principle should apply here as civil rights plaintiffs should not be singled out for different and less favorable treatment.

In addition to this apt analogy, Congress through the Senate Report at 6 gave further direction as to the appropriate standards of fee compensation:

> The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter." Davis, supra; Stanford Daily, supra, at 684.

In Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), the Fifth Circuit rejected a trial court's low and abitrarily calculated fee award, id. at 717; directed trial courts to consider twelve factors commonly used to determine counsel fees, id. at 717-19; and pointed out that these twelve factors were "consistent with those recommended by the American

Bar Association's Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106," id. at 719.

What is of particular importance here is not just Congress' reliance on Johnson but Congress' observation through the Senate Report at 6 that the Johnson factors were "correctly applied" in such cases as Stanford Daily, Davis and Swann, cases in which fees were calculated under the lodestar method common in antitrust cases: hours reasonably expended multiplied times market rates, with upward adjustments where appropriate.

In Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), fees were calculated under the lodestar method. First, as to hours expended, all 750 hours were allowed as compensable including time spent on the clients' behalf on an unsuccessful motion for a preliminary injunction. Id. at 683-84. Second, market-based noncontingent hourly rates averaging $50 per hour were allowed since the hourly rates "fairly reflect [the attorneys'] experience" and since they "compare favorably with the rates charged by other attorneys in this area for work involving complex questions of fact and law." Id. at 685. Finally, and primarily in view of "the American Bar Association's determination that attorneys deserve higher compensation for contingent than for fixed fee work," in view of the fact that upward contingency adjustments "provide full and fair compensation," and also in view of the fact that a contingency adjustment providing a reasonable fee "helps attract attorneys to the enforcement of important constitutional principles and significant congressional policies which might otherwise go unrepresented," an upward adjustment of approximately 28% was allowed to insure a reasonable fee. Id. at 685.

This same methodology was followed in Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974). First, after certain insufficently documented hours were disallowed, all properly documented hours were deemed compensable including time spent on matters lost or not ruled on. Id. at p. 5048. As to the latter time:

> It ... is not legally relevant that plaintiffs' counsel expended a certain limited amount of time pursuing certain issues of fact and law that ultimately did not become litigated issues in the case or upon which plaintiffs ultimately did not prevail. Since plaintiffs prevailed on the merits and achieved excellent results for the represented class, plaintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.

Id. at p. 5049. Second, as to time expended in the early 1970s, fees were allowed according to market-based noncontingent hourly rates ranging from $10 per hour for a law clerk and a paralegal up to $65 per hour for lead counsel. Id. at p. 5048. Finally, because of the contingent representation and the excellent results obtained, an upward adjustment of approximately 18% was allowed to insure a reasonable fee.

The court in the third illustrative case cited with approval in the Senate Report, Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975), did not necessarily use the lodestar method. Instead, the court listed the 2,700 hours expended, the market rates in Charlotte at that time of $30 to $35 per hour and up, the exceptional experience of counsel, the excellent results obtained, and the difficulty of the case. After reviewing all of these factors, the court awarded plaintiffs' lawyers $175,000 in fees. By whatever method was used by the court to compute this fee award -- the court may have simply doubled the customary billing rate in Charlotte to $65 per hour to arrive at the final sum -- the court did attempt to assure that plaintiffs' counsel received a reasonable award of fees.

The importance of Stanford Daily, Davis and Swann stem not only from Congress' observation that "[t]hese cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys," Senate Report at 6 (emphasis added), but also from Congress' admonition "that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing [the 1976 Fees Act]," House Report at 8; see also Senate Report at 4.

Congress' guidance as to the allowance of market-based fees has been, not surprisingly, routinely followed by the federal courts in hundreds of cases, albeit frequently over the objections and appeals of losing government defendants. In fact, Congress' directives as well as the illustrative cases of Stanford Daily, Davis and Swann were specifically relied on by the Supreme Court in its fee compensation decisions in Blum v. Stenson, 79 L.Ed.2d 891, 898-900 (1984) (market-based hourly rates), and Hensley v. Eckerhart, 461 U.S. 424, 429-34 (1983) (compensable hours in cases in which plaintiffs assert different claims for relief).

All of this however is irrelevant to the Justice Department. Through S. 1580, the Justice Department blinks at Congress' approval of market-based standards, seeks to overrule hundreds of court decisions including Blum and Hensley, and seeks to insure that reasonable fees would never be awarded to plaintiffs' counsel in cases brought against government wrongdoers.

1. Time Spent on Winning Issues

Section 5(2)(A) of the bill requires plaintiffs' counsel, when applying for fees, to establish that the work for which fees are sought was performed "in connection with issues upon which the party prevailed against" the government. In other words, under new section 5(2)(A), plaintiffs' counsel would be entitled to compensation not for lawsuits or even claims won but instead only for time expended in connection with "issues" on which a plaintiff "prevailed." Stated in the negative, counsel would not be entitled to compensation for time spent on "issues" which were lost or which were never ruled on.

In its Section-by-Section Analysis, the Justice Department makes clear that it is not merely seeking to limit fees in lawsuits in which there are legally and factually unrelated claims for relief but that it instead is seeking to limit fees in all lawsuits only to time expended on "issues, substantive or procedural, upon which the party prevailed in the disposition of the controversy." The Justice Department nowhere mentions however that its proposed limitation focusing on "issues" would have a devastating effect as a practical matter, that it would totally obliterate Congress' standards, or that it would overturn numerous court decisions implementing Congress' standards.

As a practical matter, new section 5(2)(A) would have a devastating effect on the amount of fees available to counsel who represent plaintiffs who ultimately are successful. This is because during the course of most lawsuits there are numerous procedural and substantive issues which are raised and addressed, or often not addressed as the case may be, prior to the final judgments or appeals which determine the winners. For example, a plaintiff may ultimately win on appeal even though in the trial court a motion for a temporary restraining order had been denied, a motion for a preliminary injunction had never been ruled on, numerous motions to compel discovery had been resolved informally, a motion for summary judgment had been denied because defendant contended there was a material fact in dispute which had to be aired at trial, and so on. In this not unusual example, counsel for a prevailing plaintiff who ultimately was 100% successful on appeal apparently would, under the Justice Department's formulation, be entitled only to appellate fees and would not be entitled to any compensation for time spent on issues pursued unsuccessfully in the trial court. And it is at least arguably possible, under the Justice Department's formulation, that no compensation would ever be recoverable in cases settled favorably to plaintiffs. See also supra at 26-34.[25/]

The Justice Department's proposal directly contravenes Congress' standards, see supra at 43-50. First, civil rights fee awards were "intended" to "be governed by the same standards which prevail in other types of complex Federal litigation, such as antitrust cases." Senate Report at 6; see also House Report at 8-9. There of course is no such "issue" limitation for fee compensaton in antitrust cases.[26/] Second, "counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" Senate Report at 6 (citations omitted). There of course is no known method of billing in private practice by which a fee-paying client is not billed for time spent on issues lost or not ruled upon. Third, the "appropriate standards" of fee compensation were "correctly applied," id, in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680, 684 (N.D. Cal. 1974), where the court expressly compensated counsel for time spent on a lost motion for a preliminary injunction since the motion "advanced their clients' interest;" Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974), where the court recognized that it was

> not legally relevant that plaintiffs' counsel expended a certain limited amount of time pursuing certain issues of fact and law that ultimately did not become litigated issues in the case or upon which plaintiffs ultimately did not prevail. Since plaintiffs prevailed on the merits and achieved excellent results for the represented class, plaintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.

id. at p. 5049; and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483, 484 (W.D.N.C. 1975), where the court compensated counsel for all time expended despite plaintiffs' losses on various "contentions" during the course of the litigation.

As should be apparent, the Justice Department's proposal not only would overturn settled case law implementing Congress' standards, but would also undermine and effectively overturn Hensley v. Eckerhart, 461 U.S. 424 (1983), a case not involving the division of cases into issues won and not won, but instead involving compensation where separate claims for relief are asserted.

The Supreme Court in Hensley held that the amount of compensation depends on the nature of the claims asserted and on the overall result achieved. First, in the relatively rare case in which "a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories ... these unrelated claims [should] be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." Id. at 434-35 (footnote omitted).[27] Second, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee" including compensation for time spent on alternative claims: "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." Id. at 435. Finally, where a plaintiff asserts interrelated "claims" and achieves "only partial or limited success," a court in its discretion may or may not reduce the fee award depending upon the particulars of each case. Id. at 436-37.

Unhappy with Hensley, unhappy with settled case law, and unhappy with the market-based fee compensation guidelines established by Congress, the Justice Department seeks to have every lawsuit parceled into issues won, lost and not ruled on: simply to deny reasonable market-based fees to counsel for successful plaintiffs.

2. Fee Ceiling of $75 Per Hour

One of the Justice Department's most dramatic attempts to eliminate "fees which are adequate to attract competent counsel," Senate Report at 6, is its proposal to eliminate market-based hourly rates. Section 6(a)(1) of the bill, as drafted by the Justice Department, states very simply that no award of fees against the government "shall exceed $75 per hour."

In its Section-by-Section Analysis, the Justice Department states that its reason for the $75 per hour ceiling is simply "to assure that fees paid to private counsel in fee-shifting cases are brought somewhat more in line with the salaries of attorneys who represent the government in these cases," and it at least implies that the $75 per hour ceiling in the Equal Access to Justice Act provides a supportive analogy. Neither in fact is true. In any event, the Justice Department once again nowhere explains the devastating effect its proposal would have on Congress' standards and upon settled law.

As is apparent, see supra at 43-50, Congress explicitly stated not only that it intended the amount of fees awarded in civil rights cases to be governed by the same standards as prevail in antitrust cases, but also that it intended counsel to be compensated by market-based fees the same as is traditional for attorneys compensated by a fee-paying client. Congress also observed that the appropriate standards of fee computation were correctly applied in Stanford Daily, Davis and Swann, cases in which counsel were compensated at market-based hourly rates.

Based on these express congressional standards, as well as on case law developed well before the enactment of the 1976 Fees Act, the federal courts have uniformly and routinely awarded fees computed on market-based hourly rates. Illustrative is Blum v. Stenson, 79 L.Ed.2d 891 (1984), where the Supreme Court, following a brief recitation of Congress' standards accompanying the 1976 Fees Act,[28] unanimously held that the "statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community regardless of whether plaintiff is represented by private or nonprofit counsel." Id. at 899-900. Not questioned in Blum, a case arising in New York City, was the reasonableness of the market-based rates allowed each of plaintiffs' three lawyers: rates of $95, $100 and $105 per hour. Id. at 896 & n.4.

Rather than admitting that it seeks to turn back the clock on extensive congressional standards or on decades of settled law, and rather than admitting that the bill seeks to make enforcement of civil and constitutional rights, etc., sufficiently unattractive to competent counsel, so as to curtail if not terminate such enforcement, the Justice Department instead proposes its $75 per hour ceiling as a means of compensating plaintiffs' counsel in a manner equivalent to the compensation of counsel for government wrongdoers.

The Justice Department's facial rationale however fails for at least four reasons. First, government counsel are paid -- usually biweekly -- whether they win or lose and in fact they often lose. Plaintiffs' counsel on the other hand are paid -- rarely during the course of a civil rights lawsuit -- only when the plaintiffs win, and in fact the plaintiffs must win in order for counsel to be entitled to fees.

Second, government counsel take home -- after tax withholding -- their entire biweekly paychecks. Plaintiffs' counsel on the other hand ordinarily must use their occasional fee award paycheck -- after tax withholding -- to pay secretarial salaries, to pay for law library subscriptions, to pay for office equipment and utilities, to pay for ever-increasing malpractice insurance, and even to pay back loans which had to be taken out during the long periods of nonpayment which accompany civil rights practice.

Third, and apart from the apparent and obvious inappropriateness of the Justice Department's attempted analogy between plaintiffs' private counsel and government defense attorneys, the fact of the matter is that it is common for government agency defendants to hire private outside counsel at market rates -- often as high as $250 or $275 per hour -- to defend government wrongdoers in civil rights cases.[29/] By seeking to place an hourly rate ceiling on plaintiffs' counsel while at the same time permitting state and local government defendants to continue to pay market rates to their outside counsel,[30/] the Justice Department through S. 1580 would vastly increase the already existing disparities in litigating power between civil rights plaintiffs without means and tax-supported government defendants.

Finally, neither the take-home salaries of government lawyers nor the market-based fees paid by government to retained outside counsel have anything to do with the congressional goal of attracting competent counsel to represent civil rights plaintiffs in cases against government wrongdoers. Yet, it is because of this objective, at least in part see infra at 78-82, that Congress has authorized market-based fee awards under fee-shifting statutes such as the 1976 Fees Act, e.g., to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights," and thereby "to promote the enforcement of the Federal civil rights acts, as Congress intended." House Report at 9.

The foregoing distinction also disposes of the Justice Department's veiled analogy between civil rights fee-shifting statutes and the Equal Access to Justice Act. The analogy simply does not wash. Never has it been suggested that the purpose of the Equal Access to Justice Act was to encourage lawyers to represent private companies in suits against the United States. To the contrary, with more than 85% of the federal government's litigation involving government action against regulated private companies all enjoying retained or in-house counsel, the purpose of the Equal Access to Justice Act was and is no more than to allow reimbursement to the companies of some of the companies' tax-deductible legal expenses when the government's position was not substantially justified.

Congress' purpose in enacting civil rights fee-shifting statutes, on the other hand, has been to encourage lawyers to represent the victims of civil rights violations so as to allow them access to the courts where their rights may be vindicated. See generally infra at 78-82. Only through the continued allowance of market-based fees can this objective even begin to be realized.

3. Cost-Based Fees

The $75 per hour ceiling is only one proposal to eliminate the use of market rates. A related proposal is found in section

6(b)(1)(B), a provision which would invite a court to reduce or even to deny a fee award if the amount "unreasonably exceeds the hourly salary" of the attorney.

In its Section-by-Section Analysis, the Justice Department concedes that its proposal is designed to limit fee awards so they do not "exceed the actual cost of the litigation." And although the Justice Department states that this limitation would apply "to all attorneys who are paid on a salaried basis" such as "associates in a law firm," the Justice Department's primary targets no doubt are salaried legal aid and legal services attorneys, salaried civil rights attorneys, and other salaried public interest attorneys.

The Justice Department's attempt to impose cost-based fees is contrary to Congress' standards, contrary to well settled law applying those standards, and contrary to the established rationales for allowing market-based fees. Additionally, as the courts have advised us, a system of cost-based fee compensation would involve inquiries of massive proportions and would be essentially unworkable.

As we have seen, see supra at 43-50, Congress in enacting the 1976 Fees Act fully endorsed market-based fees without exception. Additionally, in each of the three illustrative fee computation cases -- Stanford Daily, Davis and Swann -- the courts allowed market-based fees not cost-based fees to all counsel including salaried civil rights lawyers. In fact, as the court concluded in Davis, 8 E.P.D. at pp. 5048-49, in the course of awarding fees to a public interest organization:

> In determining the amount of the fees to be awarded, it is not legally relevant that plaintiffs' counsel ... are employed by the Center for Law In The Public Interest, a privately funded non-profit public interest law firm. It is in the interest of the public that such law firms be awarded reasonable attorneys' fees to be computed in the

traditional manner when its counsel perform legal services otherwise entitling them to the award of attorneys' fees.

Arguments similar to those now set forth in the Justice Department's proposal were squarely presented and rejected in Blum v. Stenson, 79 L.Ed.2d 891 (1984). In that case, the State of New York urged the Supreme Court "to require that all fee awards under § 1988 be calculated according to the cost of providing legal services rather than according to the prevailing market rate." Id. at 898 (footnote omitted). The Justice Department, "as amicus curiae, urge[d] the Court to adopt a cost-related standard only for fee awards made to nonprofit legal aid organizations." Id. Based primarily on Congress' standards, the Supreme Court rejected both cost-based contentions and unanimously held "that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." Id. at 899-900 (footnote omitted).

The Supreme Court in Blum did not at all change the law; it simply summarized Congress' standards and confirmed what every federal court of appeals in the nation had already recognized. As summarized by one of those courts: "The notion that fee awards should be reduced where they are to be paid to not-for-profit organizations has been rejected by every court of appeals to consider it." Gautreaux v. Chicago Housing Authority, 690 F.2d 601, 613 (7th Cir. 1982), cert. denied, 461 U.S. 961 (1983).[31]

In reaching this unanimity, the courts of appeals frequently explained the fundamental premise supporting market-based fee awards for public interest organizations: full fee awards further the purpose of fee-shifting statutes by enabling the continuation of similar civil rights litigation. As the Second Circuit explained in Torres v. Sachs, 538 F.2d 10, 13 (2d Cir. 1976), since a full fee award to public interest organizations "promotes their continued existence and service to the public," accordingly "full recompense for the value of services in successful litigation helps assure the continued availability of the services to those most in need of assistance." See also Palmigiano v. Garrahy, 616 F.2d 598, 601-02 (1st Cir.) ("a full market fee award will enable it to undertake further civil rights litigation," and a full market fee thus "serves the clearly expressed legislative purpose of encouraging private enforcement of civil rights laws"), cert. denied, 449 U.S. 839 (1980); Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980) (a full market fee award "encourages the legal services organization to expand its limited resources in litigation aimed at enforcing the civil rights statutes").

At the same time, the courts also pointed out that a cost-based formulation not only would be unworkable but also would require massive ancillary litigation. For example, as the en banc Court of Appeals for the District of Columbia Circuit observed in rejecting a cost-based argument: the "problems associated with administering a 'cost-plus' calculus are multifarious," the nature of the questions which would have to be answered "creates the specter of a monumental inquiry on an issue wholly ancillary to the substance of the lawsuit," the far-reaching inquiries would "'assume massive proportons, perhaps even dwarfing the case in chief,'" and the result would be that a "'cost-plus' method of calculating fees would indeed become the inquiry of 'massive proportions' that we strive to avoid." Copeland v. Marshall, 641 F.2d 880, 896 (D.C. Cir. 1980) (en banc), vacating 594 F.2d 244 (D.C. Cir. 1978).

Undaunted, the Justice Department, in its rush to discourage civil rights enforcement, nevertheless seeks to impose upon plaintiffs' counsel and the courts themselves ancillary fee litigation of massive proportions.

4. Law Students and Paralegals

The Justice Department seeks to deny fee entitlement, and to limit fee awards, mostly in big ways. But it also seeks these results in small ways. Illustrative is section 3(1) of the bill, which defines compensable attorneys fees only as fees attributable to "professional legal services performed by a person, or persons, licensed to practice law."

As the Justice Department explains in its Section-by-Section Analysis, the language of new section 3(1) is intended to bar fee awards covering the services provided by law students. New section 3(1) would similarly bar fee awards covering the services of paralegals.[32] Not explained by the Justice Department is the fact that new section 3(1) contravenes Congress' standards and settled law.

Congress, as is now familar, directed that fee compensation in civil rights cases be governed by the same standards that apply in antitrust cases and that apply when counsel are compensated by a fee-paying client. Antitrust fee compensation and typical law firm billing include market fees for legal services performed by law students and paralegals. See supra at 52 n.26. The rationale is obvious: where necessary legal services can be performed by law students or paralegals at low hourly rates, it is more economical for the work to be performed and billed in this manner rather than having the work performed and billed by lawyers with their higher hourly rates.

Congress also, as is now familiar, relied on three illustrative cases as correctly applying the appropriate standards of fee computation. In one of those cases, Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974), the court expressly awarded fees at the then market rate of $10 per hour covering the services of a law student and of a paralegal.

Based on Congress' standards and also on common practice, the courts not surprisingly have routinely awarded fees at low hourly rates -- nevertheless market rates -- covering the legal services of law students and paralegals.[33]

The Justice Department opposes fee awards covering the low hourly rate services of law students and paralegals apparently for no other reason than that it opposes fees in general and thus civil rights enforcement in particular. Yet, if new section 3(1) were enacted, as the Justice Department seems to urge, the curious effect may be that high-hourly-rate lawyers would end up performing the legal services now undertaken by low-hourly-rate law students and paralegals, with the net result of higher fee awards.

5. Lodestar Adjustments

Section 6(a)(2) states flat out that "[b]onuses or multipliers shall not be used in calculating awards of attorneys' fees" against the government. Somewhat contradictorily, section 6(b)(2)(A) invites courts to use a multiplier, albeit a negative multiplier, or to otherwise reduce "or deny" fees where the fee award "unreasonably exceeds the monetary result or value of injunctive relief achieved in the proceeding."

In its Section-by-Section Analysis, the Justice Department provides no discussion of its proposal for a flat-out ban on bonuses or multipliers, other than to reiterate that it proposes such a ban; in any event, given the overall tenor of the Justice Department's proposals, we may safely assume that the Justice Department seeks to ban not only bonuses and multipliers but also the more commonly used upward adjustments: upward adjustments of hourly rates, or of hours-times-rates lodestars, to provide reasonable fees in cases involving contingency risks, delays in payment, or excellent results. The Justice Department, however, is not so silent with regard to its proposed use of negative multipliers. In its view, fee awards apparently should be reduced in any case in which fees exceed the monetary result, or in which fees exceed the value of the injunctive relief (whatever that means).

Characteristically, the Justice Department nowhere explains that its proposals contradict Congress' standards as well as settled law, or that its proposals would guarantee unreasonably low fees.

By approving for civil rights litigation the fee computation standards governing antitrust litigation -- where upward adjustments are routine if not standard operating procedure and where downward adjustments are virtually unheard of, see supra at 52 n.26[34/] -- Congress plainly intended similar results to follow in civil rights cases. Additionally, Congress cited with approval no cases involving downward adjustments (there no doubt were none to cite), but it stated that the appropriate standards were correctly applied in such cases as Stanford Daily, Davis and Swann, all of which involved the use of upward adjustments.

Despite Congress' explicit standards, there is little question that the federal courts have not often awarded upward adjustments in civil rights cases, at least certainly not as frequently as they are allowed in antitrust cases; and there similarly is little question that when upward adjustments are awarded in civil rights cases they are relatively small compared with the often substantial upward adjustments (doubling and tripling are common) in antitrust cases. See supra at 52 n.26. Nevertheless, the use of upward adjustments always remains possible to assure reasonable fees in cases in which plaintiffs establish that there were substantial contingency risks, considerable delays in payment, or excellent results. See generally Blum v. Stenson, 79 L.Ed.2d 891, 903 & n.17 (1984); id. at 904-05 (Brennan, J., concurring); Hensley v. Eckerhart, 461 U.S. 424, 435 (1983) ("in some cases of exceptional success an enhanced award may be justified"). Subsequent to Blum and Hensley, the federal courts have continued to allow modest upward adjustments at least in occasional public interest cases,[35] and they most certainly have not allowed downward adjustments in cases where plaintiffs have vindicated their rights but obtained less than optimal monetary or injunctive relief.[36]

Although upward adjustments in civil rights cases are thus far from automatic, and in fact are relatively infrequently awarded, the possibility of their allowance remains necessary as a matter of both law and legal ethics to insure a reasonable fee. As the court reasoned in Congress' illustrative case of Stanford Daily v. Zurcher, 64 F.R.D. 680, 685 (N.D. Cal. 1974), court decisions allowing upward adjustments to account for contingency risks "parallel the American Bar Association's determination that the attorneys deserve higher compensation for contingent than for fixed-fee work." Similar observations have been made by the en banc Fifth Circuit:

> Lawyers who are to be compensated only in the event of victory expect *and are entitled to be paid more* when successful than those who are assured of compensation regardless of result. This is neither less nor more appropriate in civil rights litigation than in personal injury cases. The standard of compensation must enable counsel to accept apparently just causes without awaiting sure winnners.

Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir.) (en banc) (emphasis added), *cert. dismissed*, 453 U.S. 950 (1981).

Removing the possibility of upward adjustments not only for contingency risks but also for delays in payment and for excellent results, as the Justice Department proposes, would remove many private practitioners from the representation of civil rights plaintiffs, as the Justice Department no doubt intends. As one civil rights lawyer in private practice pointed out several years ago in testimony before this Subcommittee, a law barring the possibility of upward adjustments to approximate reasonable fees would effectively preclude competent counsel from representing civil rights plaintiffs.

> The [1976 Fees] Act [would] no longer attract competent counsel in the private enforcement of civil rights, should this amendment be adopted, for the simple reason that it would bar the awarding of "reasonable" attorneys' fees.
>
> * * *
>
> Absent contingency or multiplier adjustments, this amendment [would] end my civil rights practice on behalf of plaintiffs.

Attorney's Fees Awards: Hearings on S. 585 Before the Subcomm. on the Constitution of the Sente Comm. on the Judiciary, 97th Cong., 2d Sess. 53-54 (1982) (testimony of Fletcher Farrington, civil rights lawyer in private practice in southern Georgia).

D. Government Fee Liability

S. 1580 seeks to lessen government fee liability in a variety of ways. It does so specifically in section 6(c) by making the plaintiffs themselves, rather than the government wrongdoers, initially liable for fees in monetary cases. And it does so more expansively at the outset by barring fee entitlement and thereafter by severely limiting the amount of fees available.

As Congress stated nearly a decade ago, one of the desired effects of shifting full fee liability to losing defendants is to insure that "those who violate the Nation's fundamental laws are not to proceed with impunity." Senate Report at 2. Under the Justice Department's proposals, however, government could repeatedly violate our nation's fundamental laws and suffer little or no fee liability as a consequence.

1. Lessened Liability in Monetary Cases

Section 6(c) states that, whenever a monetary judgment is awarded, "a portion of the judgment (but not more than 25% thereof) shall be applied to satisfy the amount of attorneys' fees to be awarded against" the government. In other words, the fee award initially would have to be satisfied by the victim of the civil rights violation rather than by the government wrongdoer.

In its Section-by-Section Analysis, the Justice Department primarily just reiterates its proposal, although it also attempts an analogy which is wholly inapplicable in the context of fee-shifting statutes.[37] Nowhere does the Justice Department explain that its proposal is totally contrary to the history and purpose of fee shifting, and that it is contrary to Congress' standards and to settled law.

As the very words "fee shifting" imply, the premise of fee-shifting statutes is that fees are to be shifted from the winner to the loser. Based on this premise, Congress during many past decades has enacted nearly 200 fee-shifting statutes. Under all of these statutes, fees are shifted according to Congress' standards from the winner to the loser.

explained, Congress expressly incorporated the standards governing fee compensation in antitrust cases as applicable in civil rights cases.

In the course of implementing these congressional standards, no court has ever held prevailing plaintiffs liable for any portion of their lawyers' fees under any civil rights fee-shifting statute, or for that matter under any fee-shifting statute. To the contrary, even in those monetary cases where counsel have contingency fee agreements with their clients, the courts have uniformly held that those agreements not only pose no limitation on defendants' fee liability but in fact are irrelevant to determining the extent of defendants' liability for all fees under fee-shifting statutes.[39]

The Justice Department's revoluntionary proposal is, as is apparent, totally contradictory of the very premise of fee shifting.

2. Lessened Liability Overall

As pernicious as new section 6(c) would be, by alleviating the fee liability of government wrongdoers at the expense of their victims, section 6(c) actually would do relatively little

For example, even in antitrust cases, where fees are shifted under § 4 of the Clayton Act, 15 U.S.C. § 15, plaintiffs who recover not just single damages but treble damages are in no way liable for the fees of their attorneys, but instead all fees are shifted to the losing defendants.[38] And, as we have repeatedly to lessen government fee liability in the context of S. 1580. Relatively. This is because other sections of S. 1580 would much more extensively limit governmental fee liability, and often eliminate it altogether.

As we have explained heretofore in this section-by-section analysis, various sections of S. 1580 would effectively eliminate fee entitlement where plaintiffs succeed through judgment, would eliminate fee entitlement where plaintiffs succeed in settled or mooted cases, and would eliminate interim fee entitlement so as to allow defense counsel to engage in an economic war of attrition against plaintiffs' counsel. For those few plaintiffs' lawyers who might be able in isolated cases to surmount the foregoing formidable barriers, other sections of S. 1580 would severely limit the amount of recoverable fees by curtailing the compensable time, by eliminating market-based hourly rates through the imposition of an hourly rate ceiling, by encouraging defense counsel to conduct detailed inquiries of massive proportions into the actual costs of the litigation, by disallowing market fees for time spent by law students and paralegals, and by banning upward adjustments while encouraging downward adjustments.

Although any one of these proposals, much less all of them cumulatively, would, if enacted, cause competent private counsel to cease their representation of would-be plaintiffs whose civil rights have been violated by government actors -- quite contrary to Congress' purpose for enacting fee-shifting statues, see infra at 77-81 -- there in any event is no question that the effect of each and all of the foregoing proposals would be to lessen and often to eliminate government liability for fees.

The effect of these proposals would be devastating not only as an end result but also on the litigation process itself. Lessening much less eliminating the fee liability of government wrongdoers would allow them to proceed with impunity. Eventually, given the absence of competent private lawyers to represent the victims of civil rights violations, such violations would go uncorrected. It would be as if our civil rights laws had themselves been repealed. "Not to award counsel fees in cases such as this would be tantamount to repealing the [substantive] Act itself." Senate Report at 3, quoting with approval from Hall v. Cole, 412 U.S. 1, 13 (1973).

Even in those few instances in which litigation might nevertheless still be brought against government wrongdoers, the protections against fee liability provided to government wrongdoers by S. 1580 would severely affect the litigation process itself. For example, as the en banc Court of Appeals for the District of Columbia pointed out in Copeland v. Marshall, 641

F.2d 880, 899 (D.C. Cir. 1980), in the context of discussing diminished fee awards in employment discrimination cases, "[t]he incentive to employers not to discriminate is reduced if diminished fee awards are assessed when discrimination is established." Moreover, "the defendant will be subject to a lesser incentive to settle a suit." Id. The court of appeals explained:

> That is so because the marginal cost of each hour of continued litigation would be reduced. Defendant's counsel could inundate the plaintiff with discovery requests without fear of paying the full value of the legal resources wasted in response. We do not think that Title VII intended that defendants should have an incentive to litigate imprudently.

Id. In sum, as the Ninth Circuit similarly concluded in Dennis v. Chang, 611 F.2d 1302, 1307 (9th Cir. 1980): "if the state could immunize itself against a fee award ... the state would have less incentive to settle pending litigation and more incentive to resist civil rights compliance by defending against the suit until trial."

Not only would S. 1580 be a bad law. It is a bad idea.

III. S. 1580 and Its Violation of Congress' Purpose to Attract Lawyers to Represent Civil Rights Plaintiffs and Thereby to Encourage the Enforcement of Our Nation's Civil Rights Laws

As we believe is apparent from our initial summary and particularly from our more detailed section-by-section analysis, S. 1580 would totally eviscerate most of the basic standards governing fee entitlement and fee computation: standards established by Congress and properly implemented by the courts in case after case after case.

However, not only does S. 1580 violate the specific guidance provided by Congress, but S. 1580 more basically violates Congress' overriding purpose for enacting civil rights fee-shifting statutes (and similar public interest fee-shifting statutes): to attract competent counsel to represent victims of civil rights violations who otherwise would be unable to gain access to the courts, and thereby to provide a mechanism for actual civil rights enforcement.

That S. 1580 would have this violative effect of deterring civil rights enforcement not only is evident from the hearing record previously compiled before this Subcommittee, see supra at 4 n.3. But this violative effect is particularly obvious from the findings made by Congress when it enacted the 1976 Fees Act. Undisputedly running through the legislative history, particularly the Senate and House Reports accompanying the Fees Act, are three recurrent themes. First, the victims of civil rights violations are ordinarily unable to afford lawyers, and are thus ordinarily unable to gain access to the courts. Second, effective civil rights enforcement depends upon actions initiated by private plaintiffs and thus depends upon encouraging private lawyers, (through the likely availability of reasonable court-awarded attorneys fees to compensate them at market rates for their time expended) to represent plaintiffs in private suits. And third, for these reasons, reasonable fee awards for counsel representing successful plaintiffs are essential if our nation's civil rights statutes are to be enforced. Each of these themes was thoroughly explored and explained by Congress through the legislative history accompanying the 1976 Fees Act.

First, Congress recognized at the outset, in the Senate Report at 2, that in "many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." This lack of financial resources, coupled with the Supreme Court's rejection of the "private attorney general" doctrine in Alyeska Pipeline Service Corp. v. Wilderness Society, 421 U.S. 240 (1975), effectively precluded access to the courts. Through the House Report at 2, Congress made clear that "civil rights litigants were suffering very severe hardships because of the Alyeska decision."

"[P]rivate lawyers were refusing to take certain types of civil rights cases," and civil rights organizations, "already short of resources, could not afford to do so" either. Id. at 3. For victims of civil rights violations, the situation was indeed bleak: "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to courts." Id. at 1. Congress thus responded by authorizing court-awarded fees as a financial incentive to attract counsel to represent persons whose rights had been violated. "In authorizing an award of reasonable attorney's fees [the 1976 Fees Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." House Report at 1. "This bill ... provides the fee awards which are necessary if citizens are to be able to effectively secure compliance with these existing [civil rights] statutes." Senate Report at 6.

Second, Congress thoroughly understood that most of our "civil rights laws depend heavily upon private enforcement," Senate Report at 2, for the obvious reason that "there are very few provisions in our Federal laws which are self-executing." Id. at 6. "The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." House Report at 1. In creating the incentive of fee awards to facilitate the functioning of the enforcement mechanism, Congress made "fees ... an integral part of the remedy necessary to achieve compliance with our statutory [civil rights] policies." Senate Report at 3. Congress did so consciously and purposefully. It was aware of Hall v. Cole, 412 U.S. 1, 13 (1973), in which the Supreme Court required a fee award in a union member's suit to enforce the Landrum-Griffin Act because: "Not to award counsel fees in cases such as this would be tantamount to repealing the [Landrum Griffin] Act itself by frustrating its basic purpose." Senate Report at 3. Similarly, Congress in both Reports quoted from the Supreme Court's decision in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968): "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts." Senate Report at 3; House Report at 6. Finally, the legislative history demonstrates that Congress reviewed the enforcement success achieved through fee-shifting provisions in other civil rights statutes: "These fee-shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation." Senate Report at 4.

Third, the legislative history leaves no doubt that Congress believed fee awards to be essential both to secure future legal representation for aggrieved individuals and to create an ongoing mechanism for civil rights enforcement in general. As summarized in the Senate Report:

> "[C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."

Id. at 2 (emphasis added); "fee awards are essential if the Federal statutes to which [the Fees Act] applies are to be fully enforced," id. at 6 (emphasis added); fee awards "are necessary if citizens are to be able to effectively secure compliance with these existing statutes," id. at 6 (emphasis added); "[i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases," id. (emphasis added).

In sum, Congress enacted the 1976 Fees Act, as it has similar fee-shifting statutes, to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights," and thereby "to promote the enforcement of the Federal civil rights acts, as Congress intended." House Report at 9.

The purpose of S. 1580 is precisely the opposite of Congress' standards: by insuring that unreasonable or usually no fees would be available, S. 1580 would discourage if not prevent any civil rights enforcement whatsoever.

CONCLUSION

Because S. 1580 would seriously curtail and often eliminate fee entitlement for counsel who represent successful plaintiffs, because the bill would severely limit the amount of fees available, because the bill would lessen and often eliminate the fee liability of government wrongdoers, and because the bill would effectively preclude lawyers from representing civil rights victims in cases against the government, thereby effectively halting civil rights enforcement, we oppose S. 1580. We urge that it not be voted out of this Subcommittee.

FOOTNOTES

1. *See generally* *Legal Fees Equity Act: Hearings on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 738-47 (1984) (letter of E. Richard Larson on behalf of the ACLU).

2. Illustrative of the detailed standards provided by Congress through the legislative history accompanying the 1976 Fees Act -- particularly S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), and H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) [hereafter the "Senate Report" and "House Report," respectively] -- and also illustrative of the federal courts' adherence to those detailed standards is the Supreme Court's frequent reliance on that legislative history to effectuate congressional intent. *See*, *e.g.*, *Pulliam v. Allen*, 80 L.Ed.2d 565, 570 & n.4, 580 & n.23 (1984) (relying on the House Report at 9); *Blum v. Stenson*, 79 L.Ed.2d 891, 898-900 (1984) (relying on the Senate Report at 6); *Hensley v. Eckerhart*, 461 U.S. 424, 429-34 & nn.2, 4, 7 (1983) (relying on the Senate Report at 4, 6; and on the House Report at 1, 7); *Maher v. Gagne*, 448 U.S. 122, 129, 132 n.15 (1980) (relying on the Senate Report at 5; and on the House Report at 4 n.7); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70-71 n.9 (1980) (relying on the House Report at 5, 8 n.16); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737-39 & n.17 (1980) (relying on the Senate Report at 4; and on the House Report at 9); *Hutto v. Finney*, 437 U.S. 678, 694 n.23 (1978) (relying on the House Report at 4 n.6).

The foregoing list of Supreme Court decisions is also illustrative of another reality involving civil rights attorneys fees: that losing defendants, rather than settling and paying fees, prefer to clog the courts with fee litigation so as to delay the date when fees ultimately must be paid to plaintiffs' unpaid counsel. Despite the Supreme Court's admonition that a "request for attorney's fees should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), and despite the fact that there should be no encouragement for "losing defendants to engage in what must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees," *id.* at 442 (Brennan, J., concurring), nevertheless it was the losing defendants who were the petitioners in *all* of the foregoing cases (losing *government* defendants in all of the cases but one), and it was the losing defendants-petitioners who ultimately lost again in *all* of the foregoing cases.

3. The effect of this bill would be identical to the effect of the earlier version of this bill, S. 2802, 99th Cong., 2d Sess. As stated by the one civil rights lawyer allowed to testify in opposition to the earlier bill, and as similarly pointed out by other practitioners who were permitted to supplement the record through prepared statements and letters, the obvious effect of a bill such as S. 2802 (and thus also of S. 1580) would be to decrease the availability of lawyers willing to represent victims of civil rights violations, which in turn would severely depress the level of civil rights enforcement in this country. *See* *Legal Fees Equity Act: Hearings on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 376-400 (1984) (testimony and statement of Charles Victor McTeer, civil rights lawyer in private practice in Mississippi); *id.* at 425-48 (statement of the Lawyers' Committee for Civil Rights Under Law); *id.* at 471 (letter of Nancy Drabble, Director of Public Citizen); *id.* at 472 (letter of Frances Dubrowski, Senior Attorney with the Natural Resources Defense Council); *id.* at 473-79 (statement of the Washington Council of Lawyers); *id.* at 480-82 (letter of Julius LeVonne Chambers, Director-Counsel of the NAACP Legal Defense and Educational Fund); *id.* at 660-92 (statement of the Alliance for Justice); *id.* at 698-737 (letter of Thomas H. Moreland; and report of the Committee on Legal Assistance of the Association of the Bar of the City of New

York); id. at 738-47 (letter of E. Richard Larson, National Staff Counsel of the American Civil Liberties Union).

In fact, the same obvious effect would have flowed from an even earlier proposed amendment to S. 585, 97th Cong., 1st Sess. (1981). See generally Attorney's Fees Awards: Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 15-43 (1982) (testimony and statement of Neil Bradley, Associate Director of the Southern Regional Office of the American Civil Liberties Union); id. at 44-57 (testimony and statement of Fletcher Farrington, civil rights lawyer in private practice in southern Georgia); id. at 58-71 (testimony and statement of Antonia Hernandez, Associate Counsel of the Mexican American Legal Defense and Educational Fund).

4. The inaccuracies and misleading statements in the Justice Department's Section-by-Section Analysis were not corrected, but instead were exacerbated, in the testimony and prepared statement submitted to this Subcommittee on October 8, 1985 by Deputy Attorney General D. Lowell Jensen on behalf of the Justice Department.

5. For reasons that may be apparent, we have been forced to limit our analysis and comments to the most extraordinary of the Justice Department's proposals. This of course does not imply that we endorse the remaining proposals, many of which are not only ill-conceived but contrary to well settled law.

For example, a proposal which we do not comment upon in the text is section 7(a), which would require a fee motion to be filed if at all only "within thirty days after a final decision by the court ... from which no appeal is taken." In its Section-by-Section Analysis, the Justice Department seeks to support this procedural requirement by misleadingly stating that the "requirement is consistent with the jurisdictional time for filing fee applications pursuant to the Equal Access to Justice Act."

That this proposal is ill-conceived is evident from the fact that it often is "unclear even to counsel which orders are and which are not 'final judgments,'" which means that if time limits were imposed "lawyers predictably would respond by entering fee motions in conjunction with nearly every interim ruling." White v. New Hampshire Department of Employment Security, 455 U.S. 445, 453 (1982) (rejection of a ten-day time limit). Even if these final judgment problems could be resolved through tightly written definitions -- which are not present here -- the Justice Department's proposal is also flawed because it does not allow time for fee settlements, id., and because it does not address the problems which arise from unresolved post-judgment motions and appeals, cf. Baird v. Bellotti, 724 F.2d 1032, 1037-38 n.6 (1st Cir. 1984) (recommending a time limit of no less than 45-60 days, with attendant flexibility).

Finally, the Justice Department's comparative reference to the 30-day time limit in the Equal Access to Justice Act is entirely misleading as a matter of law since the courts have widely held, contrary to the literal language of the statute, that the time limit does not and cannot as a matter of common sense begin to run until the time for all appeals has been exhausted. See Judge Richard Posner's seminal decision for the Seventh Circuit in McDonald v. Schweiker, 726 F.2d 311 (7th Cir. 1983); see also, e.g., Keasler v. United States, 766 F.2d 1227 (8th Cir. 1985); Russell v. National Mediation Board, 764 F.2d 341 (5th Cir. 1985); Feldpausch v. Heckler, 763 F.2d 229 (6th Cir. 1985); Massachusetts Union of Public Housing Tenants, Inc. v. Pierce, 755 F.2d 177 (D.C. Cir. 1985); Taylor v. United States, 749 F.2d 171 (3d Cir. 1984).

6. To the extent that a burden has been placed on the courts, it is a burden which, we submit, has been placed there by losing government defendants who ordinarily refuse to settle or to pay fees, and who choose instead to litigate every possible fee issue often all the way to the Supreme Court ... during which time the losing government defendants ordinarily pay nothing and the lawyers for the successful plaintiffs receive nothing. See supra at 2-3 n.2. See also, e.g., Moore v. City of Des Moines, 766 F.2d 343, 345 & n.2 (8th Cir. 1985), where, on the losing govern-

ment defendants' fee appeal raising eight so-called fee issues, the Eighth Circuit summarily rejected seven of the issues in a single sentence, and rejected the eighth issue in a two-sentence footnote.

7. As noted earlier, the Senate and House Reports are, respectively: S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S. Code, Cong. & Ad. News 5908-14; and H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976), reprinted in E. Larson, Federal Court Awards of Attorney's Fees, 288-312 (1981).

8. The application of the congressional guidance accompanying the 1976 Fees Act to similar fee-shifting statutes is not at all limited only to civil rights fee-shifting statutes. Instead, Congress' guidance has been widely applied under virtually all fee-shifting statutes, including those governing commercial litigation. See, e.g., Southwest Marine, Inc. v. Campbell Industries, 732 F.2d 744, 746-47 (9th Cir. 1984), where the Ninth Circuit applied the standards for determining prevailing plaintiff status under the 1976 Fees Act to determining prevailing plaintiff status under the Clayton Act.

9. Because of the similarities shared by so many fee-shifting statutes, it also is not unusual for the courts to make a ruling under the 1976 Fees Act applicable to similar fee-shifting statutes. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983) ("The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party'").

10. The inappropriateness of this standard in settled and mooted cases, and the effect that new section 3(9) would have on Congress' standards and on settled law, are discussed infra at 26-34.

11. Among the many reported decisions in Laffey -- a hard fought case spanning more than a decade, are the following decisions, beginning with the initial decision on liability, Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973); remedial order, 374 F. Supp. 1382 (D.D.C. 1974), aff'd in relevant part, 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978); supplemental remedial order, 481 F. Supp. 199 (D.D.C. 1980), aff'd, 642 F.2d 578 (D.C. Cir. 1980); supplemental orders and final judgment aff'd, 740 F.2d 1071 (D.C. Cir. 1984).

12. In addition to the fee-shifting provision in the Clean Air Act, 42 U.S.C. § 7607(f), the Court in Ruckelshaus, 463 U.S. at 682 n.1, cited to the similar fee-shifting provisions in other environmental statutes, see, e.g., Toxic Substances Control Act, 15 U.S.C. § 2618(d); Endangered Species Act, 16 U.S.C. § 1540(g)(4); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c); Clean Water Act, 33 U.S.C. § 1365(d); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g)(4); Deepwater Port Act, 33 U.S.C. § 1515(d); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d); Noise Control Act, 42 U.S.C. § 4911(d); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435(d); Ocean Thermal Energy Conversion Act, 42 U.S.C. § 9124(d); and Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5).

13. See, e.g., Evans v. Harnett County Board of Education, 684 F.2d 304, 307 (4th Cir. 1982) (plaintiff who had won no individual relief is a prevailing plaintiff because his "successful pursuit of an injunction against unlawful discrimination vindicated the policies underlying Title VII"); United States v. Board of Education of Waterbury, 605 F.2d 573, 576 (2d Cir. 1979) (intervening plaintiffs who vindicated their rights by obtaining some modifications in a proposed school desegregation plan are prevailing plaintiffs).

14. See, e.g., Lamar v. Steele, 693 F.2d 559, 563 (5th Cir. 1982); Basiardanes v. Galveston, 682 F.2d 1203, 1220 (5th Cir. 1982); Milwe v. Cavuoto, 653 F.2d 80, 84 (2d Cir. 1981); Familias Unidas v. Briscoe, 619 F.2d 391, 405-06 (5th Cir. 1980); McNamara v. Moody, 606 F.2d 621, 626 (5th Cir. 1979); Perez v. University of Puerto Rico, 600 F.2d 1, 2 (1st Cir. 1979); Burt v. Abel, 585 F.2d 613, 617 (4th Cir. 1978).

15. See generally the discussion of settlements and mooted cases infra at 26-34.

16. In its discussion of the relevant provisions of section 3, 4 and 5, the Justice Department in its Section-by-Section Analysis in fact never mentions settlements or mooted cases at all, much less the new burdens of proof which would be placed on plaintiffs and their counsel in those contexts. Instead, the Justice Department discusses settlements and mooted cases only with regard to new section 8, a provision which would provide additional defenses to government defendants far beyond those recognized by Congress or allowed under settled law.

17. *See*, *e.g.*, *Ortiz de Arroyo v. Barcelo*, 765 F.2d 275 (1st Cir. 1985) (defendants removed the challenged land use restrictions only after the lawsuit was filed); *Hennigan v. Ouachita Parish School Board*, 749 F.2d 1148 (5th Cir. 1985) (defendants adopted a constitutionally sound reapportionment plan only after the lawsuit was filed); *Garcia v. Guerra*, 744 F.2d 1159 (5th Cir. 1984) (defendants submitted voting law changes for preclearance by the Attorney General under the Voting Rights Act only after the lawsuit was filed); *Seegull Manufacturing Co. v. N.L.R.B.*, 741 F.2d 882 (6th Cir. 1984) (defendants released documents requested under the FOIA only after and because the lawsuit was filed); *Fields v. Tarpon Springs, Florida*, 721 F.2d 318 (11th Cir. 1983) (defendant provided equal capital improvements to the black community only after the lawsuit was filed); *Williams v. Fairburn, Georgia*, 640 F.2d 635 (5th Cir. 1981) (defendants agreed to continue a federal housing program for low income residents only after the lawsuit was filed); *Morrison v. Ayoob*, 627 F.2d 669 (3d Cir. 1980) (only after suit was filed did defendants cease their unconstitutional practice of convicting indigents of petty offenses without affording them a right to counsel), *cert. denied*, 449 U.S. 1102 (1981); *Fischer v. Adams*, 572 F.2d 406 (1st Cir. 1978) (defendant agreed to provide back pay to the discriminated against plaintiff only after the lawsuit was filed); *ISKCON v. Andersen*, 569 F.2d 1027 (8th Cir. 1978) (defendants rescinded regulations barring free speech only after the lawsuit was filed).

18. *See*, *e.g.*, *Newman v. Graddick*, 740 F.2d 1513 (11th Cir. 1984) (defendants agreed to remedy unconstitutional conditions of confinement in their prison system); *Smith v. Thomas*, 725 F.2d 354 (5th Cir. 1984) (defendant agreed to reinstate plaintiff on the ground that the firing of plaintiff was not constitutionally defensible); *White v. Richmond*, 713 F.2d 458 (9th Cir. 1983) (defendants agreed that their police officers would cease harassing black residents); *Charles v. Coleman*, 689 F.2d 774 (8th Cir. 1982) (defendants agreed not to discontinue a federally funded training program); *Disabled in Action v. Mayor & City Council of Baltimore*, 685 F.2d 881 (4th Cir. 1982) (defendants agreed to make Baltimore's Memorial Stadium physically accessible to disabled persons); *Pratt v. Board of Education of Frederick County*, 674 F.2d 259 (4th Cir. 1982) (defendants agreed to provide equivalent services to an emotionally handicapped child); *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980) (defendants agreed to expunge plaintiff's record of alleged misconduct); *Dawson v. Pastrick*, 600 F.2d 70 (7th Cir. 1979) (defendants agreed to institute various fair employment practices); *Criterion Club of Albany v. Board of Commissioners of Dougherty County*, 594 F.2d 118 (5th Cir. 1979) (defendants agreed to eliminate discriminatory at-large elections).

19. The Justice Department's only discussion in its Section-by-Section Analysis of interim fee awards occurs in the context of new section 3(10), which defines "final decision," and in the context of new section 5(1), which allows fees only where a party has "prevailed on the merits." In this limited discussion, the Justice Department states that, in its view, an interim award of fees "would not be appropriate for a party who has prevailed only on a motion for preliminary injunction." Even this limitation would work a substantial change of settled case law based on Congress'standards. *See infra* at 38 n.20 and accompanying text. Nowhere, however, does the Justice Department point out that the broader effect of new section 3(9) would be the elimination of virtually all interim fee awards in all contexts.

20. See also, e.g., Chu Drua Cha v. Levine, 701 F.2d 750 (8th Cir. 1983); Coalition for Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982); Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982), cert. denied, 460 U.S. 1012 (1983); Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980), cert. denied, 450 U.S. 1012 (1981); Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980), cert. denied, 451 U.S. 993 (1981); Kimbrough v. Arkansas Activities Association, 574 F.2d 423 (8th Cir. 1978).

The courts have also properly allowed fees where plaintiffs have essentially succeeded as a result of obtaining a temporary restraining order. See, e.g., Virzi Subaru Inc. v. Subaru of New England, Inc. 742 F.2d 677 (1st Cir. 1984); Fitzharris v. Wolff, 702 F.2d 836 (9th Cir. 1983); Iranian Students Association v. Edwards, 604 F.2d 352 (5th Cir. 1979).

21. In other cases allowing interim fees, the foregoing observations in James have been quoted with approval, see, e.g., Carpenter v. Stephen F. Austin State University, 706 F.2d 608, 633 (5th Cir. 1983); Hameed v. Int'l Ass'n of Bridge Workers, Local 396, 637 F.2d 506, 523 (8th Cir. 1980).

22. See, e.g., In re Kansas Congressional Districts Reapportionment Cases, 745 F.2d 610 (10th Cir. 1984).

23. See, e.g., Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir.), cert. denied, 454 U.S. 863 (1981).

24. See, e.g., Burney v. Housing Authority of Beaver, 735 F.2d 113 (3d Cir. 1984); Akron Center for Reproductive Health v. Akron, 604 F. Supp. 1268 (N.D. Ohio 1984); Decker v. United States Department of Labor, 564 F. Supp. 1273 (E.D. Wis. 1983); Vulcan Society of Westerchester County v. Fire Department of White Plains, 533 F. Supp. 1054 (S.D.N.Y. 1982).

Would-be intervenor-defendants who lose their motions to intervene are similarly liable for fees. See, e.g., Thompson v. Sawyer, 586 F. Supp. 635 (D.D.C. 1984); Robideau v. O'Brien, 525 F. Supp. 878 (E.D. Mich. 1981); cf. Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974) (would-be intervenor-plaintiff is liable for fees).

25. An additional practical problem -- not only from the perspective of counsel for prevailing plaintiffs but also from the courts' perpective particularly given the litigiousness of losing defendants, see supra at 2-3 n.2 -- is that the division of cases into "issues" won, lost and not ruled upon, would serve as an invitation to defendants and their counsel to argue ad infinitum that plaintiffs allegedly failed to prevail on numerous minor matters. This invitation, which few defendants or their counsel would be able to resist, is of course contrary to the Supreme Court's admonition that a "request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983), quoted with approval in Blum v. Stenson, 79 L.Ed.2d 891, 904 n.19 (1984).

26. For a review of the fee computation standards in antitrust cases (pertaining not only to compensable hours but also to hourly rates and upward adjustments), see generally E. Larson, Federal Court Awards of Attorney's Fees 161-240 (1981).

27. In its Section-by-Section Analysis at n.10, the Justice Department selectively and misleadingly quotes from these passages in Hensley in a misguided effort to garner support for the Justice Department's proposal to divide all cases into time spent on issues won (which would be compensable) and time spent on issues lost or not ruled upon (which would not be compensable). Hensley, which addresses claims for relief, provides no support for, and in fact has nothing to do with, the Justice Department's unworkable issue-by-issue proposal.

28. In addition to reciting and relying on Congress' standards, the Supreme Court in Blum, 79 L.Ed.2d at 899 n.10, observed that "Congress was legislating in light of experience when it enacted the 1976 fee statute," that "[b]y that time, courts were familar with calculating fee awards" in civil rights cases, and that in the cases decided at that time "[r]eference to market rate was uniform."

29. *See Legal Fees Equity Act: Hearings on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98 Cong., 2d Sess. 376-400 (1984) (testimony and statement of Charles Victor McTeer, civil rights lawyer in private practice in Mississippi); *id*. at 660-92 (statement of the Alliance for Justice).

30. Although section 10 of S. 1580 proposes to limit somewhat the ability of some United States agencies to hire private outside counsel at rates in excess of $75 per hour, section 10 is riddled with exceptions; and in any event nothing in the bill affects the ability of state and local governments to continue to retain highly paid private outside counsel.

31. The Seventh Circuit's observation was no mere understatement, as is revealed by the following cases, listed by circuit.

FIRST CIRCUIT: *Palmigiano v. Garrahy*, 616 F.2d 598, 601-02 (1st Cir.) (market fees for the ACLU), *cert. denied*, 449 U.S. 839 (1980); *Reynolds v. Coomey*, 567 F.2d 1166, 1167 (1st Cir. 1978) (market fees for the NAACP Legal Defense Fund).

SECOND CIRCUIT: *Carey v. New York Gaslight Club, Inc.*, 598 F.2d 1253, 1255 n.1 (2d Cir. 1979) (market fees for the NAACP), *aff'd*, 447 U.S. 54 (1980); *Beazer v. New York City Transit Authority*, 558 F.2d 97, 100 (2d Cir. 1977) (market fees for the Legal Action Center), *rev'd on other grounds*, 440 U.S. 568 (1979); *Torres v. Sachs*, 538 F.2d 10, 13-14 (2d Cir. 1976) (market fees for the Puerto Rican Legal Defense Fund).

THIRD CIRCUIT: *Inmates of Allegheny County Jail v. Pierce*, 716 F.2d 177, 180 (3d Cir. 1983) (market fees for Neighborhood Legal Services of Pittsburgh); *Pawlak v. Greenawalt*, 713 F.2d 972, 979 (3d Cir. 1983) (market fees for the Public Citizen Litigation Group); *Miller v. Apartments and Homes of New Jersey, Inc.*, 646 F.2d 101, 113 (3d Cir. 1981) (market fees for the National Committee Against Discrimination in Housing, and for the Middlesex County Legal Services Corporation); *Rodriguez v. Taylor*, 569 F.2d 1231, 1247-48 (3d Cir. 1977) (market fees for Community Legal Services of Philadelphia), *cert. denied*, 436 U.S. 913 (1978).

FOURTH CIRCUIT: *Tillman v. Wheaton-Haven Recreation Association*, 517 F.2d 1141, 1148 (4th Cir. 1975) (market fees for the ACLU).

FIFTH CIRCUIT: *Morrow v. Finch*, 642 F.2d 823, 825-26 (5th Cir. 1981) (market fees for the Lawyers' Committee); *Watkins v. Mobile Housing Board*, 632 F.2d 565, 567 (5th Cir. 1980) (market fees for the Legal Services Corporation of Alabama); *Thompson v. Madison County Board of Education*, 496 F.2d 682, 689 (5th Cir. 1974) (market fees for the Lawyers' Committee); *Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974) (market fees for the Lawyers' Committee).

SIXTH CIRCUIT: *Louisville Black Police Officers Organization v. Louisville*, 700 F.2d 268, 276-78 (6th Cir. 1983) (market fees for the NAACP Legal Defense Fund); *Northcross v. Board of Education of Memphis*, 611 F.2d 624, 637-38 (6th Cir. 1979) (market fees for the NAACP Legal Defense Fund), *cert. denied*, 447 U.S. 911 (1980).

SEVENTH CIRCUIT: *Gautreaux v. Chicago Housing Authority*, 690 F.2d 601, 612-13 (7th Cir. 1982) (market fees for the ACLU), *cert. denied*, 461 U.S. 961 (1983); *Mary and Crystal v. Ramsden*, 635 F.2d 590, 601-02 (7th Cir. 1980) (market fees for the Youth Policy and Law Center); *Hairston v. R & R Apartments*, 510 F.2d 1090, 1092-93 (7th Cir. 1975) (market fees for Legal Services).

EIGHTH CIRCUIT: *McLean v. Arkansas Board of Education*, 723 F.2d 45, 47 (8th Cir. 1983) (market fees for the ACLU); *Collins v. Hoke*, 705 F.2d 959, 964 (8th Cir. 1983) (market fees for the Legal Services Corporation of Iowa); *Oldham v. Ehrlich*, 617 F.2d 163, 168-69 (8th Cir. 1980) (market fees for the Nebraska Legal Aid Organization).

NINTH CIRCUIT: *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1446-47 (9th Cir. 1984) (market fees for the Alaska Legal Services Corporation, and for the Northwest Labor & Employment Law Office); *Dennis v. Chang*, 611 F.2d 1302, 1305-09 (9th Cir. 1980) (market fees for the Legal Aid Society of Hawaii).

TENTH CIRCUIT: Ramos v. Lamm, 713 F.2d 546, 551-52 (10th Cir. 1983) (market fees for the ACLU).

ELEVENTH CIRCUIT: See Fifth Circuit decisions binding on the Eleventh Circuit.

DISTRICT OF COLUMBIA CIRCUIT: Donnell v. United States, 682 F.2d 240, 251-52 (D.C. Cir. 1982) (market fees for the Lawyers' Committee); Copeland v. Marshall, 641 F.2d 880, 898-900 (D.C. Cir. 1980) (en banc) (market fees are to be awarded to all public interest organizations).

32. The Justice Department also explains in its Section-by-Section Analysis that it intends the language of new section 3(l) similarly to bar fees for licensed lawyers who represent themselves as clients. Contrary to the Justice Department's implication that current law bars such fee awards to pro se lawyers, the fact of the matter is that most courts do allow fees to pro se lawyers. See, e.g., Duncan v. Poythress, 750 F.2d 1540 (11th Cir. 1985); Cazalas v. United States Department of Justice, 709 F.2d 1051 (5th Cir. 1983); Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980); Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977).

33. See, e.g., Cameo Convalescent Center v. Senn, 738 F.2d 836 (7th Cir. 1984); Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983); Richardson v. Byrd, 709 F.2d 1016 (5th Cir. 1983); Jordan v. United States Department of Justice, 691 F.2d 514 (D.C. Cir. 1982); Smith v. Heath, 691 F.2d 220 (6th Cir. 1982); Suzuki v. Yuen, 678 F.2d 761 (9th Cir. 1982).

34. Illustrative of the adjustments routinely allowed in antitrust cases are In re Chicken Antitrust Litigation, 560 F. Supp. 963 (N.D. Ga. 1980) (after allowing noncontingent hourly rates up to $150 for counsel, $35 for law clerks, and $25 for paralegals, the court allocated multipliers of 2.25 for lead and liason counsel, 2.0 for other principal counsel, and 1.75 for all other counsel, resulting in a fee award of more than $3.6 million); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 680 (D. Minn. 1975) (after allowing noncontingent hourly rates of $100 per hour for 16 lead counsel for work performed in the early 1970s, the court allocated multipliers ranging from 2.0 to 2.5 covering dozens upon dozens of lawyers in 16 law firms). These cases are not unusual, they are typical. See supra at 52 n.26.

35. Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897 (3d Cir. 1985) (affirmance of a 25% upward adjustment for delay in payment; remand as to an adjustment for contingency and quality); Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985) (affirmance of a 30% upward adjustment); Garrity v. Sununu, 752 F.2d 727 (1st Cir. 1984) (affirmance of a 20% upward adjustment for plaintiffs' two lead counsel based on exceptional results and on quality of representation not reflected in counsel's low hourly rates); Craik v. Minnesota State University Board, 738 F.2d 348 (8th Cir. 1984) (25% upward adjustment, to account for contingency, in award of appellate fees); Burney v. Housing Authority of Beaver, 735 F.2d 113 (3d Cir. 1984) (upward adjustment available so long as plaintiffs satisfy their burden of proof on remand).

The occasional upward adjustments in these cases generally follow the pattern established prior to Blum and Hensley. See, e.g., Burney v. Pawtucket, 728 F.2d 547 (1st Cir. 1984) (10% upward adjustment for contingency risks); Action on Smoking and Health v. Civil Aeronautics Board, 724 F.2d 211 (D.C. Cir. 1984) (10% upward adjustment of appellate fee award to account for delay in payment and results obtained); Planned Parenthood of Central and Northern Arizona v. Arizona, 718 F.2d 938 (9th Cir. 1983) (10% upward adjustment); White v. Richmond, 713 F.2d 458 (9th Cir. 1983) (multiplier of 1.5 for contingency risks and the results obtained); Gabriele v. Southworth, 712 F.2d 1505 (1st Cir. 1983) (10% upward adjustment for contingency); Louisville Black Police Officers Organization v. Louisville, 700 F.2d 268 (6th Cir. 1983) (multiplier of 1.33 for contingency factors); Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983) (multiplier of 2 for contingency factors); Dowdell v. Apopka, Florida, 698 F.2d 1181 (11th Cir. 1983) (multiplier of 1.15 for contingency risks);

Maceira v. Pagan, 698 F.2d 38 (1st Cir. 1983) (multiplier of 1.5 for contingency and quality factors); *Minority Employees at NASA v. Frosch*, 694 F.2d 846 (D.C. Cir. 1982) (contingency enhancement of 10% allowed to salaried public interest attorneys).

36. *See*, *e.g.*, *DiFilippo v. Morizo*, 759 F.2d 231 (2d Cir. 1985) (reversing a 50% downward adjustment for low monetary recovery, on the ground that low monetary recoveries are the norm in fair housing cases); *Lynch v. Milwaukee*, 747 F.2d 423 (7th Cir. 1984) (reversing a 25% downward adjustment for low monetary recovery).

37. The Justice Department, in its Section-by-Section Analysis, posits that forcing successful plaintiffs to pay 25% of their monetary judgments as fees is really no different from the allegedly similar situation under § 206 of the Social Security Act, 42 U.S.C. § 406. The fallacy in the Justice Department's attempted analogy is that the foregoing provision of the Social Security Act is not a fee-shifting statute, as is for example the Equal Access to Justice Act. Thus, in situations where a social security claimant is entitled to fees under the fee-shifting Equal Access to Justice Act, both the 25% limitation in § 206 of the Social Security Act and that statute itself become irrelevant, with the result that it is the federal government which is liable for counsel's fees. *See*, *e.g.*, *Watford v. Heckler*, 765 F.2d 1562 (11th Cir. 1985), and cases cited therein.

Here, of course, the Justice Department's proposal is made totally and only in the context of fee-shifting statutes under which the losing defendants have been by definition the only parties liable for counsel's fees.

38. *See*, *e.g.*, *Twin City Sport Service, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1312-17 (9th Cir. 1982), and cases cited therein.

39. *See*, *e.g.*, *Easley v. Empire, Inc.*, 757 F.2d 923 (8th Cir. 1985); *Sisco v. J.S. Alberici Construction Co.*, 733 F.2d 55 (8th Cir. 1984); *United Slate Workers, Local 307 v. G & M Roofing and Sheet Metal Co.*, 732 F.2d 495 (6th Cir. 1984); *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983) (en banc); *Sullivan v. Crown Paper Board Co.*, 719 F.2d 667 (3d Cir. 1983); *Criswell v. Western Airlines*, 709 F.2d 544 (9th Cir. 1983); *Sanchez v. Schwartz*, 688 F.2d 503 (7th Cir. 1982); *Cleverly v. Western Electric Co.*, 594 F.2d 638 (8th Cir. 1979); *Sargeant v. Sharp*, 579 F.2d 645 (1st Cir. 1978).

S. 1580 and its Effect on Congress' Standards and on Settled Law

The New, Altered Standards Proposed in S. 1580	Current Standards Established by Congress and Now a Matter of Settled Case Law	Congressional Standards and Settled Case Law Which Would be Overruled
Threshold Entitlement Standards		
Primarily under new § 3(9) plaintiffs would have to obtain a "final decision," succeed on a "significant issue," and win "significant relief." As to the third prerequisite, the Justice Department illustrates as insignificant the relief obtained in Laffey v. Northwest Airlines, where plaintiffs won across the board injunctive relief against sex discrimination, and nearly $50 million in double back pay.	Settled law, based on standards previously established by Congress, is totally to the contrary. Counsel for civil rights plaintiffs are entitled to fees where plaintiffs vindicate rights, or where they succeed on a significant issue and obtain some of the benefit sought. Counsel for environmental plaintiffs are entitled to fees so long as plaintiffs obtain some degree of success.	S. 1580 would overturn Congress' standards underlying the 1976 Fees Act, Pub. L. 94-559, as set forth in the Senate Report at 5 and in the House Report at 7. In civil rights cases, the bill would overturn Hensley v. Eckerhart (U.S. Sup. Ct. 1983) and hundreds of other court decisions. In environmental cases, the bill would overturn Ruckelshaus v. Sierra Club (U.S. Sup. Ct. 1983) and many other court decisons.

Threshold Entitlement Standards in Settled or Mooted Cases

Primarily under new § 3(9) plaintiffs again would have to obtain a "final decision," succeed on a "significant issue," and win "significant relief."	Settled law, based on Congress' standards, includes none of these prerequisites. Counsel for plaintiffs are entitled to fees where plaintiffs vindicate their rights through settlement, or where plaintiffs vindicate their rights in a lawsuit which is mooted through defendants' provision to plaintiffs of some of the benefit sought.	S. 1580 would overturn Congress' standards underlying the 1976 Fees Act as set forth in the Senate Report at 5 and in the House Report at 7. The bill would overturn Maher v. Gagne (U.S. Sup. Ct. 1980) and hundreds of other court decisions.

Entitlement to Interim Fees

New § 3(9) again would require plaintiffs to obtain a "final decision," succeed on a "significant issue," and win "significant relief" before fees could be recovered.	Under settled law, based on Congress' standards, entitlement to interim fees arises when plaintiffs prevail on an important matter in the course of litigation, or upon entry of an order which determines the substantial rights of the parties. In practice, interim fee entitlement arises when plaintiffs in protracted litigation establish defendants' liability, or when plaintiffs obtain an important ruling such as a preliminary injunction.	S. 1580 would overturn Congress' standards as set forth in the Senate Report at 5 and in the House Report at 8. The bill also would overturn such cases as Bradley v. School Board of Richmond (U.S. Sup. Ct. 1974), Mills v. Electric Auto-Lite (U.S. Sup. Ct. 1970), and many other court decisions.

Entitlement to Fees Against Intervenors

New § 4(d) would bar fees against intervenor-defendants who intervene to support the action taken by government defendants.	The literal language of most fee-shifting statutes authorizes fee entitlement where plaintiffs prevail against any party, whether an original defendant or an intervenor-defendant. Fee awards are widely allowed against intervenor-defendants because their very presence multiplies the proceedings and increases the burdens placed on plaintiffs' counsel.	S. 1580 would overturn the literal meaning of most fee-shifting statutes, and would overturn hundreds of court decisions.

Fees for Time Reasonably Spent or Only for Time Spent on Winning Issues

New § 5(2)(A) would allow fees for time spent only on "issues" on which plaintiffs prevailed, and would disallow fees for time spent on procedural or substantive matters which were lost or were never ruled upon.	Settled law, based on Congress' standards, does not permit cases to be divided up into "issues" won, lost, or not ruled on. Instead, counsel are entitled to fees for all time reasonably expended on behalf of their clients. Where separate claims are litigated in a single lawsuit, counsel are entitled to fees for time spent only on the winning claims. Where a lawsuit involves factually or legally interrelated claims, counsel are entitled to fees for time spent on all claims so long as plaintiffs obtain excellent results.	S. 1580 would overturn Congress' standards set forth in the Senate Report at 6 and in the House Report at 8-9. The bill also would overturn Hensley v. Eckerhart (U.S. Sup. Ct. 1983) and hundreds of other court decisions.

Fees at Market Rates or Limited to a $75 Per Hour Ceiling

New § 6(a)(1) would limit fee awards against losing government defendants to a $75 per hour ceiling (but it would have no effect upon the practice of state and local governments of hiring outside counsel at market rates to defend government wrongdoing).	Under settled law, based on Congress' express standards, and also based on Congress' purpose of attracting competent counsel to represent civil rights plaintiffs and other public interest plaintiffs, counsel for prevailing plaintiffs are entitled to market-based hourly rates.	S. 1580 would overturn Congress' standards set forth in the Senate Report at 6 and in the House Report at 8-9. The bill also would overturn Blum v. Stenson (U.S. Sup. Ct. 1984) and dozens of decisions rendered by every federal court of appeals in the nation.

Fees at Market Rates, or Cost-Based Fees

Apart from the $75 per hour fee cap, new § 6(b)(1)(B) would invite a further reduction of a fee award which would unreasonably exceed the hourly salary of a plaintiff's attorney. This cost-based provision is directed at further lowering the fees available for salaried civil rights lawyers and for law firm associates.	Under settled law -- as explained above -- counsel for prevailing plaintiffs are entitled to market-based hourly rates. Additionally, the use of cost-based fees has been repeatedly rejected by courts such as the en banc court in Copeland v. Marshall (D.C. Cir. 1980) on the ground that cost-based fees would invite a "monumental inquiry" of "massive proportions" which would unduly burden plaintiffs' counsel and the courts alike.	S. 1580 would overturn Congress' standards set forth in the Senate Report at 6 and in the House Report at 8-9. The bill also would overturn Blum v. Stenson (U.S. Sup. Ct. 1984) and dozens of decisions rendered by every federal court of appeals in the nation.

Fees Covering Law Students and Paralegals

New § 3(1) of the bill would bar fee awards covering services provided by law students and paralegals.	Under settled law, based on Congress' standards, fee awards may cover all reasonable services provided by law students and paralegals who are billed at lower hourly rates than are experienced lawyers.	S. 1580 would overturn Congress' standards set forth in the Senate Report at 6 and in the House Report at 8-9, and would also overturn dozens of court decisions implementing those standards.

Adjustments to Provide for Reasonable Fees

New § 6(a)(2) would bar the possibility of any upward adjustments in determining a reasonable fee, while new § 6(b)(2)(A) would invite downward fee adjustments relative to the monetary result or the "value" of the injunctive relief obtained.	Under settled law, based on Congress' standards, the initial calculation of an hours-times-rates fee may be adjusted upward so as to allow a reasonable fee. Adjustment factors include the contingency risk of not prevailing, delays in payment in protracted litigation, and achievement of excellent results or exceptional success. Congress' standards do not address downward adjustments relative to the relief obtained since Congress sought to provide reasonable fees to counsel for plaintiffs who vindicate their rights.	S. 1580 would overturn Congress' standards set forth in the Senate Report at 6 and in the House Report at 8-9. The bill also would overturn *Blum v. Stenson* (U.S. Sup. Ct. 1984), *Hensley v. Eckerhart* (U.S. Sup. Ct. 1983), and dozens of other court decisions.

Fee Liability of Government Defendants in Monetary Cases

New § 6(c) would make the prevailing plaintiffs themselves initially liable for fees in monetary cases -- up to 25% of the monetary award to plaintiffs -- thereby lessening and sometimes eliminating the fee liability of the government wrongdoers.	Under settled law, based on Congress' standards, losing defendants are liable for the entirety of all fee awards. In fact, the very premise of all fee-shifting statutes is to shift fees to the losing defendants.	S. 1580 would overturn logic and common sense, Congress' standards, and the history of fee shifting.

Fee Entitlement and Fee Compensation Standards Established by Congress

New § 2(a) denigrates Congress for its alleged "failure to provide stanards to guide courts" in awarding fees, and the Justice Department thus purports to propose standards where none now exist.	Primarily through the Senate Report and the House Report accompanying the 1976 Fees Act, Pub. L. 94-559, Congress provided extensive standards both as to fee entitlement and as to fee compensation. These standards not only have been incorporated by Congress into subsequent fee-shifting legislation but also have been deferred to by the Supreme Court in a dozen decisions and by the lower federal courts in hundreds upon hundreds of of decisions.	S. 1580 would overturn Congress' standards, would overturn a dozen Supreme Court decisions, would overturn hundreds upon hundreds of lower court decisions, and would open up settled law for massive new litigation. S. 1580 also would contravene Congress' basic purpose for enacting fee-shifting laws: to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights" and thereby "to promote the enforcement of the Federal civil rights acts, as Congress intended."

Mr. **Larson**. We weren't prepared. We would still appreciate a hearing.

Senator **Hatch**. I understand. What we would like to do is keep the record open for whatever you would like to submit. We will consider that information; then if we feel we need to have a hearing, we will consider holding one.

Mr. **Larson**. We do appreciate the subcommittee holding hearings quickly after bills are introduced, but 1 day is a little bit too quick, I believe.

Senator **Hatch**. The problem is that we have too many hearings. On the other hand, we want to also cover these materials properly. *Pulliam* does involve a number of important issues, some of which you have pointed out. So we cannot ignore the issue. We will just have to see what we can do.

We want to thank all three of you for coming. It has gotten my attention and we will just see what we can do. I think something has to be done. I am not quite sure just exactly what is the best solution.

We have tried to come up with a solution in these two bills. On the other hand, we will certainly look at your testimony again and your written remarks, as well, and see where we go from there.

We want to thank you for being here.

With that, we will recess this committee until further notice.

[At 10:58 a.m., the committee was adjourned sine die.]

APPENDIX

ADDITIONAL STATEMENTS AND VIEWS

FEDERALLY EMPLOYED WOMEN
LEGAL AND EDUCATION FUND, INC.
1707 L STREET, N.W., SIXTH FLOOR
WASHINGTON, D.C. 20036

Established 1977

800—368-0102
202—659-2090

STATEMENT ON BEHALF OF FEDERALLY EMPLOYED WOMEN LEGAL AND EDUCATION FUND (FEW-LEF)

BY JANET COOPER, PRESIDENT, FEW-LEF
October 29, 1985

Today I present to the committee the views of FEW-LEF on the Legal Fees Equity Act (S. 1580). Our organization has as its major goals the elimination of discrimination in employment in the Federal government and the defense of human rights. To further these goals we provide legal assistance and services to individuals and classes involved in issues concerning opportunities and advancement in government employment, especially where employment discrimination is an issue. Since many of the cases where attorney's fees are awarded are brought under the auspices of Title VII and since the Federal government is the largest employer in the United States and is often the defendant in such suits here and throughout the nation, we feel particularly qualified to comment on the matters raised by this bill.

We adamantly favor the right of each Title VII plaintiff to the best legal representation possible. In the legal profession such representation is too often lacking for plaintiffs of modest means. Statistics show that the majority of women and minorities in the Federal government are still in grades GS-8 and below. With an average annual salary of $15,000 or less, these employees are unable to finance a suit at the rate of $30,000 to 50,000 in order to enforce their rights on the job. Even less able are those who are fired, those who are job applicants, or those who are forced out of their jobs by sexual harassment and/or reprisal for using the complaint system.

Are rights without the means of exercising them real? Martin Luther King, Jr. said no. He said there is little gain in a black person being allowed to eat at a previously segregated restaurant if he or she is denied a job which provides the means to pay for a meal there. The sad fact is that the Federal administrative EEO complaint procedure is so complex and lengthy that an employee ventures there at her peril without counsel. Most complainants end up in court anyway since agencies rarely find themselves guilty of discrimination.

To proceed in federal district court through discovery, dispositive motions, and pre-trial preparation without an attorney is foolhardy at best. This would be true for any plaintiff but is especially the case for Federal workers. In their cases the defendant has at his disposal the enormous resources of the United States government. Normally both an Assistant U.S. Attorney and an agency counsel are assigned to a case. Personnel and EEO officials supplement them in discovery along with the latest research tools and paralegals.

So the employee who sues the Federal government for job discrimination has a right to the best legal representation and an undeniable need for same. The only thing which is missing is the means to obtain such representation. This of course was the reasoning behind fee shifting in these cases from the start. The real questons is whether $75 per hour will buy such representation.

Here an inquiry into the actions of the defendant (the U.S. government) in seeking legal counsel on thorny employment issues should be one way to determine what competent, experienced counsel costs. The firm hired to assist the Federal Aviation Administration in litigation during the PATCO strike received reimbursement at the rate of $150 per hour. So did private attorneys hired by the U.S. Postal Service to advise it in a Fair Labor Standards Act case brought by its employees. And we note that the Attorney General's counsel fees were more than $200 per hour when he was charged with wrongdoing. If competent counsel is readily available at $75 per hour, why didn't the government act in the interests of the taxpayer and hire such counsel in these cases? Why is it only Mr. Meese who is entitled to a really good lawyer when his employment is threatened and not a federal worker who is supporting three children and really needs her job?

Proponents of this bill may very well point to Section 10 and say that they have resolved this issue by also requiring that the government hire attorneys only at $75 per hour. All this does is restrict everyone, including the people of the United States, in their efforts to secure competent counsel. That is not the solution.

But this bill goes beyond a $75 cap on attorney fees. It forbids the use of bonuses or multipliers to successful plaintiffs in Section 6(b)(1)(A). In the face of continuous dilatory tactics by many U.S. Attorneys (often requiring three years to get a simple case to trial) and frivolous appeals which delay back pay and attorney fee awards an additional year, this is unconscionable. When the Federal government does not get tax dollars on time, it charges interest. It should act the same way when a debtor as when a creditor. That would be real equity. Furthermore, this bill provides for a reduction or denial of fees to a plaintiff who delays the proceedings but does not similarly punish a recalcitrant defendant with interest. What is equitable about that?

The bill also seeks to reduce attorney fee awards to public interest organizations such as FEW-LEF in Section 6(b)(1)(B). This section requires a court to reduce attorney fees if the amount is more than the salary of the attorney working on the case. This implies that the organization pays no rent, has no secretarial help, and incurred no expenses in bringing the litigation beyond that of the attorney's salary. In effect this section is designed to cut off adequate fees to organizations which often take cases for indigent fees to organizations which often take cases for indigent clients or class action too complex for individual practitioners. So again we see the real purpose of this bill--not to reduce fee amounts but to stop civil rights litigation altogether by cutting off access to the courts.

Equally offensive is the provision in Section 6(c) that up to 25% of the plaintiff's recovery will be paid toward an attorney fee award. In Title VII cases such awards are often no more than a few thousand dollars and they represent back pay due an employee because the Federal government discriminated against him or her. What happened was in no way due to any action of the plaintiff but was the result of defendant's actions. To require the plaintiff to share the cost of the suit when she was not the cause for it being brought is far from the equity claimed in the title of this bill. In fact it penalizes those who are successful in fighting job discrimination.

What will be the effect of this bill if passed with these provisions? Federal employees will face complex litigation which can have widespread impact either without counsel or with inexperienced counsel.

Make no mistake about it! This bill is not an isolated piece of proposed legislation. It is part of an all-out attack on those who are fighting against employment and other types of discrimination. President Reagan has attempted to cut off funding for FEW-LEF and other civil rights groups through the Combined Federal Campaign regulations, which efforts have been stymied so far. He is attempting to eradicate affirmative action as a tool to end discrimination through actions in the courts and by Executive Order. Government lawyers are discouraged from pro bono activities such as representing plaintiffs in discrimination cases in the administrative process. Now private attorneys and public interest groups will be unable to provide representation because of the cap. Cutting off court access by insuring a paucity of qualified lawyers to bring suit is just one part of this attach on civil rights. We can not--we must not--allow success in any of these areas.

We urge the committee to defeat this bill and to rely instead on the marketplace (which the administration touts as the great savior elsewhere) if fee setting. The current case law does just that. If any change should be made, it is one mandating that the Federal government pay interest on back pay and attorney's fees to discourage frivolous appeals and other dilartory tactics after a case is won at trial. Private sector employers do pay such interest and the United States should be no different.

We appreciate the opportunity to present our views to the committee on this important issue. To those who think this legislation is crucial because it will save millions of dollars by lowering the amount of attorney's fees paid to successful plaintiffs, we level a challenge: Eliminate job discrimination in the Federal government. Then there will be no successful plaintiffs and no fees paid. This total solution is within the power of all U.S. defendants in Title VII suits. It is a much nobler way to remedy what the bill's sponsors see as a problem. One can only speculate as to why they have rejected this option.

Thank you.

Statement of the Alliance for Justice

Introduction

This statement is submitted on behalf of the Alliance for Justice and its members. We appreciate the opportunity to comment on the Legal Fees "Equity" Act (hereinafter the "Act"), S. 1580. For reasons similar to those on which we based our opposition to S. 2802 last year, we oppose S. 1580, and urge that it not be reported out of this Subcommittee. However, because S. 1580 contains several new and troubling provisions, we are presenting a new analysis of the Act. We respectfully request that the Subcommittee incorporate the comments that we made on S. 2802 into the record on S. 1580.

The Alliance for Justice is a national association of public interest law organizations. Its members[1] provide legal representation to a wide variety of clients, including Black and Native Americans, poor persons, consumers, women, children, and persons who are institutionalized in mental health facilities. Many of the clients now served by these public interest attorneys are members of groups that have traditionally lacked the resources to obtain representation to vindicate their legal rights. On behalf of these clients, members of the Alliance have been litigating a number of important cases, safeguarding constitutional and statutory rights and in some instances significantly advancing the law.

Alliance members are funded in various ways, including membership dues, foundation grants, charitable donations, and, for a small number of the Alliance organizations, some public monies. When a public interest organization that is a member of the Alliance receives an award of attorneys' fees pursuant to a fee-shifting statute, the award monies are channelled directly into continuing, improving, and if possible increasing, the legal representation the organization offers. All members of the Alliance have received and continue to receive many more requests for legal assistance than they have the resources to provide.

This is the third time that this Subcommittee has considered a bill that would limit the availability of attorneys' fees to plaintiffs who succeed in proving that government-defendants have violated citizens' Constitutional or statutory rights. Yet for the third time, the proponents of this bill have been manifestly unable to demonstrate any need or justification for this legislation. Representatives of the Reagan Administration, of the National Association of Attorneys General, and of state and local government bodies have testified in support of this bill and have purported to analyze the need for it; yet none have provided any data substantiating this need.

The proponents of S. 1580 have been unable to document the need for the Legal Fees "Equity" Act precisely because there is no need for this kind of legislation. Awards of attorneys' fees to plaintiffs who prevail under statutes that contain fee-shifting provisions have not been excessive. The Department of Justice's own statistics on awards of fees in the U.S. District Court for the District of Columbia over the past eleven years, show that fee awards have been moderate in the overwhelming majority of cases.[2] This data also shows that the anecdotal "horror stories" provided by the bill's proponents are both extraordinary and the only "evidence" that can be proffered in support of this bill.

In this statement, we do not purport to address every problem posed by the proposed Act; instead, we are confident that the record developed this year, in the hearings on S. 2802 last year, and in the hearings on S. 584 and S. 585 in 1981, reflect the wide variety of substantial problems in the proposed bill. Here we discuss only the bill's most egregious provisions, and we have structured our analysis around four major themes.

First, the Legal Fees "Equity" Act is not equitable. The bill contains a number of provisions that will virtually ensure that private citizens with legitimate grievances will be unable to vindicate their rights. Plaintiffs will often be unable to attract competent legal counsel to represent them, and in those rare instances where they are able to attract counsel, the government-defendants whom they sue will enjoy a number of substantial and unjust litigating advantages. S. 1580 will guarantee that, whereas plaintiffs will be severely limited in the amounts they can spend to assert fundamental rights, government-defendants who violate those rights will remain free to expend unlimited taxpayer dollars to defend themselves.

Second, S. 1580 threatens to undermine the fundamental rights guaranteed private citizens by the Constitution and federal laws. It does this both by limiting the feasibility of citizen suits to enforce these rights and by penalizing those who bring them. If S. 1580 is enacted, private citizen suits to enforce constitutional, civil, environmental and consumer rights will rarely be brought. Moreover, the Act will remove the deterrent effects that fee-shifting statutes have on government law violators -- who will be free to ignore both the Constitution and federal statutes, with little fear that they will ever be held accountable.

Third, despite the repeated assertions by the sponsors of S. 1580 that the purpose of this bill is to provide standards to guide courts in interpreting and applying fee-shifting statutes, S. 1580 actually provides no standards and is instead riddled with ambiguities. The Act will set aside a consistent body of statutory and judicial guidelines and substitute in its place a number of vague, and as yet undefined, "standards." The only certainty in the proposed bill is that it will significantly limit the availability of fees to plaintiffs who succeed in proving that the government has violated the law. Exactly how it will do so will be known only after extensive and costly litigation.

Fourth, a number of provisions of the Legal Fees "Equity" Act will encourage irresponsible conduct on the part of attorneys. S. 1580 will provide plaintiffs' attorneys with a substantial disincentive to zealously pursue the interests of their clients, for fear that they will never be paid for the time and effort devoted to complex and novel legal arguments. Further, S. 1580 will encourage government-defendants and their attorneys to delay and extend litigation and to refuse to reach reasonable pre-trial settlements.

Finally, it is essential to emphasize the context in which this bill is important. The Legal Fees "Equity" Act is significant because of the devastating effect that it will have on the fundamental substantive rights that are served by fee-shifting statutes. In discussing the "need" for a Legal Fees "Equity" Act, the sponsors and proponents of S. 1580 have conveniently ignored the interests and rights at stake, and have instead focused only on a vague and unfounded cry for "reforms."

But the substantive rights underlying the fee-shifting statutes are the real issue. These rights are vital to a democratic society, and include the right to vote, the right to be free from unlawful discrimination, the right to a clean and healthy environment, and others. Congress has repeatedly recognized the fundamental nature of these "citizens' rights," and has stressed that unless citizens are able to bring suits to enforce them, they will go unvindicated and government violations of them will go undeterred. If S. 1580 is enacted, the primary mechanism for enforcing the laws that protect fundamental citizens' rights will be dismantled.

I. THE LEGAL FEES "EQUITY" ACT IS ANYTHING BUT EQUITABLE

The Legal Fees "Equity" Act is inequitable and will exacerbate the inequality of resources between plaintiffs who are seeking to vindicate constitutional and statutory rights and the government-defendants who violate those rights. By capping and limiting the amount of fees that prevailing plaintiffs can recover and by significantly curtailing the legal services for which plaintiffs can recover fees, the Act strongly favors government-defendants. This bill will reduce plaintiffs' fee awards to such an extent that, in many cases, aggrieved citizens will be unable to attract experienced and competent counsel to prosecute violations of fundamental constitutional and statutory rights. Yet, it will do nothing to reduce the amount of resources that state and local governments can expend to defend themselves in cases where plaintiffs allege violations of these rights. In short, this bill will create a serious imbalance between citizen plaintiffs and government-defendants, will result in an inequitable distribution of taxpayer dollars and will demean the importance of fundamental citizens' rights.

A. A $75 Cap Will Make It Virtually Impossible For Plaintiffs To Attract Competent Legal Counsel To Litigate Important And Complex Cases Involving Citizens' Rights

Section 6(a)(1) of the proposed bill would limit fee awards to prevailing plaintiffs to no more than $75 per hour. But a fee of $75 per hour or less[3] is often inadequate to attract the experienced and competent counsel vital to successfully prosecute complex cases involving citizens' rights. Unlike fees based on prevailing market rates, a ceiling of $75 fails to account for important factors such as the complexity of a case, the novelty of the issues presented, attorney expertise in the area of law and the rates necessary to attract competent counsel in any given geographical area. These factors are considered whenever an attorney sets his or her fees and similarly must be taken into account in order to make public interest cases economically feasible and attractive to competent counsel, and to successfully prosecute complex and potentially protracted cases.

In enacting numerous statutes with fee-shifting provisions, Congress recognized that market rate fee awards are essential to attract experienced and competent counsel to prosecute complex cases involving constitutional, civil, environmental and consumers' rights.[4] Prior to the enactment of fee-shifting statutes, few lawyers were economically able or willing to represent plaintiffs bringing citizen suits in which the potential for damage awards was often minimal.[5] Congress rightfully determined that only through market rate fee awards could skilled attorneys be encouraged to handle such demanding and intricate cases. Therefore, Congress mandated that fees "be governed by the same standards [i.e. market rates] which prevail in equally complex Federal litigation, such as antitrust cases."[6]

Even supporters of the Legal Fees "Equity" Act have conceded that fees of $75 per hour may prove inadequate to attract competent legal counsel to complex cases. For example, Francis X. Bellotti, Attorney General of Massachusetts, and Jim Jones, Attorney General of Idaho, who are both major proponents of this bill, admitted in written testimony submitted to this Subcommittee on October 8, 1985, that in some geographical areas a fee award of $75 per hour may be insufficient to attract competent counsel.[7]

Moreover, although the National Association of Attorneys General has been a strong advocate of a cap on attorneys' fees, Attorney General Bellotti was joined by forty-two other Attorneys General in arguing that market rate fee awards are necessary to successfully prosecute certain other complex cases. In Illinois

v. Sangamo Construction Co., the Attorneys General of 43 states filed an amicus brief in support of the award of market rate fees to state Attorneys General in antitrust cases.[8] The Attorneys General argued that their fee awards should be based on the prevailing market rates charged by private attorneys with similar experience for similar work,[9] and that upward adjustments (i.e. bonuses and multipliers) should be applicable to the computation of their fees.[10] The forty-three Attorneys General argued that anything less than market rates would be inadequate to enable them to successfully prosecute complex cases.[11] Yet although the Attorneys General stood in support of market rate fee awards for state Attorneys General, the National Association of Attorneys General supports the Legal Fees "Equity" Act even though it would abolish market rate fee awards for plaintiffs who prevail in public interest cases. Clearly, if market rates are essential to the successful prosecution of antitrust cases, they are essential to the successful prosecution of equally complex citizens' rights cases.

The drafters of the Legal Fees "Equity" Act have themselves implicitly recognized that a $75 cap on fees is inadequate to attract competent counsel. Responding to criticism of the Act that was introduced in the last session of Congress,[12] the bill's sponsors included a provision in S. 1580 (section 10) that appears, on its face, to place a $75 per hour limit on the amount the federal government can pay outside counsel. However, section 10 only limits the amount that the federal government can pay outside counsel in twenty-five percent of its cases.[13] This bill applies exclusively to federal agencies that get their funding directly from "appropriated funds" and thus exempts the FDIC and FSLIC from coverage. These two agencies, however, account for more than seventy-five percent of all federal government litigation involving the employment of outside private counsel.[14] The FDIC, for example, paid outside private attorneys more than $34 million during 1983 and the first nine months of 1984, at rates of up to $285 per hour.[15] Nonetheless, under S. 1580 neither agency will be limited in the amount that it can pay outside counsel. Plainly, the drafters of the 1985 version of the

Legal Fees "Equity" Act recognize that competent counsel can not be retained for less than $75 per hour, and thus have chosen to exempt from its coverage the two federal agencies that most need and use outside private counsel.

Moreover, when the federal government prosecutes complex cases and seeks fee awards, its counsel frequently request and recover fees based on market rates.[16] The Legal Fees "Equity" Act would do nothing to change this; it would limit the fees that private plaintiffs can recover under fee-shifting statutes while leaving the government free to seek fees that are not subject to an arbitrary ceiling.

Finally, recent surveys of antitrust, securities and civil rights cases show that attorneys in antitrust and securities cases are receiving fees far in excess of the fees received by experienced civil rights attorneys.[17] Thus, even without the Legal Fees "Equity" Act, litigation aimed at vindicating important constitutional and statutory rights is less attractive to attorneys and has "second-class" status. Reducing fee awards to an arbitrary and inflexible $75 per hour maximum will simply demean the importance of laws which promise all equal rights, a clean and healthy environment and fair and honest treatment as consumers.

B. A Cap On The Fees That Prevailing Plaintiffs Can Recover For Vindicating Important Rights Without A Corresponding Limit On The Fees That State And Local Government Defendants Can Pay Outside Private Counsel To Defend Them, Is Grossly Unfair And Inequitable

Perhaps the greatest inequity in the proposed bill is that it will not limit the amount of taxpayer dollars that state and local governments can expend to defend violations of fundamental rights in the very same cases where victorious plaintiffs are unable to recover more than $75 per hour -- despite proving that the government has violated the law. Thus, for example, an indigent plaintiff seeking to employ an attorney to challenge a state or municipalities' unconstitutional limits on voting rights, or an unconstitutionally segregated school district, or a state's granting of a water discharge permit in clear violation of federal regulations, can often promise the attorney no fees and can instead guarantee only the fees that the attorney might win in the case. Under the Legal Fees "Equity" Act, that fee award would not exceed and would probably be much less than $75 per hour. State and local governments, on the other hand, will be able to promise their outside counsel unlimited taxpayer dollars to defend themselves in the very same actions, regardless of whether they ultimately win or lose.

In fact, state and local governments frequently do pay outside counsel in excess of $75 per hour.[18] For example, in an action to defend a voting rights lawsuit, the City of Fort Lauderdale, Florida, paid a Washington law firm $90,468 for less than three months of work. The same Washington law firm was hired to defend a voting rights case in the City of Mobile, Alabama, and was paid an average rate of $134.24 per hour.[19]

In short, the Legal Fees "Equity" Act will result in the use of taxpayer dollars to create a gross imbalance of resources in favor of government-defendants. State and local governments will be free to use almost unlimited resources to defend themselves and to collect fees far in excess of $75 per hour when they prosecute cases, while plaintiffs will never be entitled to collect fees in excess of $75 per hour. Violators of civil, consumer and environmental rights laws will be able to buy security at the expense of both the victims of the violations and the American taxpayer.

C. The "Hourly Salary" Provision Will Limit Many Attorneys To Far Less Than $75 Per Hour, Thus Making It Even Harder For Plaintiffs To Attract Competent Counsel

Section 6(b)(1)(B) of the proposed bill requires a court to reduce or deny fees if the award of fees "unreasonably exceeds the hourly salary of the attorney representing the party." In its section-by-section analysis of the bill, the Department of Justice interpreted this section as generally limiting fee awards to no more than double an attorney's "hourly salary."[20] By tying fee awards to "hourly salaries," S. 1580 will make it impossible for most attorneys to receive even $75 per hour.

Many attorneys who work for public interest organizations often get paid low salaries which are a mere fraction of what attorneys in private firms are paid. Public interest attorneys often work for non-profit groups who use their revenues, from whatever source derived, not to pay their attorneys high salaries, but to perform valuable community services and to pursue important social goals.

Under the Legal Fees "Equity" Act, an award of even $20 per hour would "unreasonably exceed" the "hourly salary" of a public interest attorney who makes $20,000 per year, or less than $10 per hour. Undoubtedly, the services rendered by such an attorney in a complex civil rights or environmental case are often worth as much or more than the services of an attorney in private practice who earns far more. Nonetheless, if this bill is passed, courts will be unable to award public interest attorneys more than twice their hourly salary. As a consequence, public interest organizations will have to think seriously before undertaking complex cases that will require huge investments of time and result in at most miniscule fee awards.

Private law firms will also be deterred from litigating constitutional, civil, environmental and consumer rights cases. Under this bill, only private attorneys whose yearly salaries exceed $78,000.00 will be eligible to receive the $75 per hour maximum.[21] For example, a third-year associate in a private law firm who has experience litigating school desegregation cases may receive a salary of $38,000.00 per year. If that attorney goes to court to challenge a school board, and after protracted and complex litigation proves that segregation exists, and submits a desegration plan which benefits an entire community, he will not be eligible for an award of fees totalling more than $36.53 per hour, or twice his "hourly salary". This will be the case under the Legal Fees "Equity" Act despite the benefits achieved and the time spent litigating such an important matter.

In short, caps and "hourly salary" limitations are artificial and fail to reflect an attorney's experience, his or her geographic location, the value of the work performed, and the benefit achieved for society. The type of services rendered by lawyers, as well as their experience, skill and reputation vary extensively even within one firm or organization though those lawyers may receive the same "hourly salaries".[22] Recognizing this, both Congress[23] and the Supreme Court[24] have mandated that attorneys who bring suits to enforce constitutional civil, environmental, and consumer rights should be entitled to fees based on market rates. By enacting S. 1580 and thus placing a "bargain price tag" on those rights, Congress would be sending out a signal that somehow these rights are worth less today than they were in the past. Rather than send this signal, Congress should reaffirm its commitment to the important policies encompassed in citizens' rights laws by encouraging their enforcement.

D. The Elimination of Upward Adjustments from the Computation of Fee Awards Will Significantly Limit the Ability of Plaintiffs to Bring Suits Under Fee-Shifting Statutes

Under current law, in certain well-defined and limited situations, a judge can increase the amount of fees awarded to a prevailing plaintiff under a fee-shifting statute. Section 6(a)(2) of S. 1580 would reverse current law and would completely eliminate the use of "bonuses and multipliers" in computing fee awards.

Upward adjustments of fee awards are made under current law only: 1) where the quality of service is high compared to the hourly rate charged; 2) where the success achieved is exceptional; 3) where a multiplier provides compensation for the amount of risk undertaken on a controversial issue; or 4) where the attorney endures lengthy delays before their fee awards are paid.[25] Yet despite their limited use by courts, upward adjustments are necessary because they reflect important factors which are not always considered in setting an attorney's hourly rate. These factors include the difficulty of the case, the length of delay an attorney endured in waiting for a fee award, and the risk that the attorney might never have recovered any fees at all. In short, upward adjustments "attempt to calculate more precisely the market value of those services provided by an attorney."[26]

Federal, state and local governments have fully recognized the importance of upward adjustments in lengthy and complex litigation. In fact, in prosecuting antitrust and other similarly complex cases, federal, state and local governments frequently request that courts use "multipliers and bonuses."[27] Indeed, in the Sangamo brief, forty-three Attorneys General argued that "multipliers and bonuses" should be applicable to the computation of fees in favor of state Attorneys General.[28] The Attorneys General noted that in choosing to pursue an antitrust action, a government attorney must take into account factors such as the significant risk with respect to success and ultimate recovery and the lost income potential that results from the allocation of limited attorney resources to a complex antitrust action.[29]

These very factors and arguments apply even more forcefully to citizen suits brought by private plaintiffs under fee-shifting statutes. Attorneys who aid private citizens in asserting their rights recover no fees at all unless they prevail in their suits. Thus, in a complex school desegration or employment discrimination suit against a government agency, a plaintiff's attorney often takes an enormous risk that due to the difficulty of the case and the contingency of ever prevailing, she may receive no payment at all for the time and effort that she invests. Further, even if she does eventually prevail, she may wait years to receive her fees, as it may take years for the parties to complete pre-trial discovery or for a court to formulate and implement a remedial scheme.

The attorneys for government-defendants, on the other hand, are guaranteed payment while a case is pending, regardless of whether they ultimately win or lose. Their receipt of fees is not contingent on their success. Thus, without upward adjustments, even where plaintiffs prevail and recover market rate fee awards, their attorneys are on unequal footing with defendants' attorneys. Merely providing an attorney market rate fee awards when she prevails can not put her in a position equal to that of the defense attorney who is paid market rates in every case in which she is involved. Further, even if a plaintiff's attorney prevails and recovers fees in every case, she can never be on equal footing with defendants' attorneys, due to the long delays in receiving court-awarded attorneys fees.

Nonetheless, the proponents of S. 1580 would like upward adjustments eliminated. Their justification for eliminating upward adjustments is that factors such as the difficulty of a case, the risk of non-recovery, and any delay in payment, are already adequately reflected in an attorney's hourly rates. However, the Legal Fees "Equity" Act caps hourly rates and ties those rates to the attorney's "hourly salary". The proposed cap and the "hourly salary" provision will ensure that the very factors that the proponents claim are reflected in an attorney's hourly rates will, in fact, never be reflected in those rates. Thus, the proponents' arguments make no sense.

S. 1580 is merely designed to deter attorneys from representing individuals whose rights have been violated. The elimination of upward adjustments, coupled with the fee cap and "hourly salary" provisions, will reduce attorneys' fees to such an extent that few attorneys will be induced to undertake cases involving citizens rights -- especially those that present novel issues or require that counsel wait a long period of time to recover fee awards.[30]

E. Law Clerks And Paralegals Are Necessary To The Preparation Of A Plaintiff's Case And This Bill Seeks To Totally Deprive Plaintiffs Of That Resource

Section 3(1) of the proposed bill limits the definition of "attorneys' fees" to "fees attributable to professional legal services performed by a person, or persons, licensed to practice law." This definition of "attorneys' fees" excludes services performed by paralegals and law clerks from fee awards.

The total exclusion of law clerk and paralegal time from fee awards is inequitable, inefficient, and contravenes current case law.[31] Many law firms and offices use paralegals and law clerks to perform necessary investigations and research. These tasks are efficiently handled by law clerks and paralegals, who can perform these services at much cheaper rates than can attorneys. Under this bill, law firms representing plaintiffs who have sued the government under fee-shifting statutes will either have to absorb the costs of this time (which will mean that most firms will not be able to afford these services at all), use valuable attorney time to perform tasks which are more efficiently and cheaply performed by law clerks and paralegals, or cut corners in researching, investigating, and preparing cases.

The elimination of paralegal and law clerk time from fee awards is even more inequitable when one considers that the government-defendants who are sued under fee-shifting statutes are equipped with entire staffs who perform these services, and that government-hired outside counsel will still be able to charge the government for these services. Thus, while plaintiffs' counsel will be forced to either cut corners in preparing their cases, or simply absorb the costs of paralegal and law clerk services, the government will remain fully staffed to research and develop their side of a case. Because plaintiffs will not be able to devote comparable resources to the development of their side of a case, they will be put in an inferior litigation position.

The elimination of paralegal and law clerk time from the computation of attorneys fees coupled with the other grossly inequitable provisions in this bill will further widen the gap between citizen plaintiffs and government-defendants and will exacerbate the inequality of litigating strength between the parties. If this bill is passed, some of our most fundamental laws will be objectively repealed by the economic fact of life that the people these laws were meant to benefit and protect will no longer be able to take advantage of them.

II. THE LEGAL FEES EQUITY ACT THREATENS THE RIGHTS AFFORDED PRIVATE CITIZENS UNDER FEDERAL LAW BY LIMITING THE FEASIBILITY OF PRIVATE CITIZEN SUITS AND REMOVING THE DETERRENT EFFECTS OF FEE SHIFTING STATUTES

Several significant provisions of the Legal Fees "Equity" Act place substantial if not insurmountable hurdles before plaintiffs and their attorneys who seek to vindicate important legal rights. One of the central objectives of this bill is to place as many obstacles as possible in the path of citizen enforcement of constitutional, civil, consumer and environmental rights. Not only would this bill serve to reduce fee awards, it would significantly heighten the legal standards that plaintiffs must meet in order to "prevail" in litigation and receive fee awards. If S. 1580 is enacted, the likelihood of a plaintiff and attorney ever recovering fees that would compensate them for the effort invested in seeking to vindicate fundamental citizens' rights will be substantially reduced. As a consequence, fewer citizen suits will be brought and government law violations will go undeterred.

A. The Requirement That Plaintiffs Obtain "Significant Relief" In Order To Be Eligible For Fees Creates A Heightened Burden For Plaintiffs And Will Result In Decreased Enforcement Of Vital Laws and Rights

Section 3(9) of the proposed bill sets out the burden that a plaintiff must bear in order to recover attorneys' fees. In order for a plaintiff to be deemed to have "prevailed" in a suit and to recover attorneys' fees under the Act, she will have to show that she "succeeded on a significant issue or issues in the controversy and obtained significant relief in connection with that issue or issues...." This burden deviates from current law, will be all but impossible to implement where a plaintiff seeks equitable relief, will give judges unlimited discretion to deny fee awards altogether, and will result in less citizen enforcement of fundamental rights.

Under current law, a plaintiff must "prevail" on the merits of a claim in order to receive reasonable attorneys' fees.[32] In Hensley v. Eckerhart,[33] the Supreme Court adopted a strict, yet workable standard for defining "prevailing party," one that previously had been adopted by every federal court of appeals.[34] Plaintiffs are considered prevailing parties if they succeed on a significant issue which achieves "some of the benefit [that they] sought"[35] in bringing the action. This common sense standard recognizes that plaintiffs do vindicate rights when they achieve some of the benefits sought in bringing a suit. Nonetheless, if the Act is adopted, the burden that plaintiffs will be required to meet in order to be deemed prevailing will be the substantially heightened one of "significant relief." This higher burden will deny deserving plaintiffs their fee awards and will curtail private citizen enforcement of constitutional and federal laws.

For example, a government employee who is a victim of discrimination might sue the government under Title VII and request that the court grant several different kinds of relief:

back-pay, reinstatement and an injunction aimed at preventing the continuation of discriminatory practices. Under current law, if the court ruled in favor of the plaintiff yet awarded her only the injunctive relief that she requested, she would almost certainly be entitled to some attorneys' fees. The injunctive relief would ensure the cessation of discriminatory practices, and would benefit not only the individual plaintiff but the public at large. Therefore, under current law, because the plaintiff prevailed on the merits and achieved at least "some of the benefits sought," she would be eligible to recover some attorneys' fees.

Yet, this very plaintiff might well be denied fees under the heightened burden imposed by the Legal Fees "Equity" Act. It will be difficult, if not impossible, to determine whether a judge will find injunctive relief "significant" in any given case. Injunctive relief, unlike monetary relief, cannot easily be quantified. Indeed, courts order injunctive relief only when monetary relief would be inadequate.[36] Thus, in our example, it would be purely within the judge's discretion to determine that the injunctive relief was not "significant," even though the plaintiff achieved some of the benefit that she sought in bringing the suit. This might be the case even if obtaining injunctive relief was the plaintiff's primary purpose in initiating the lawsuit.

Similarly, a court might deny fees if the plaintiff was awarded the monetary, but not the injunctive, relief. A court could, in its discretion, find the monetary relief insignificant. Because of the heightened burden, it will simply be easier for courts to deny fees. In short, under the Legal Fees "Equity" Act, plaintiffs will often be unable to recover attorneys fees - even when they prevail on the merits, vindicate fundamental rights, and achieve some of the benefit sought in bringing suit.

Plaintiffs should not be subject to a higher standard in order to recover attorneys' fees. Indeed, Congress and the Supreme Court have recognized that a plaintiff need only prevail "on an important matter in the course of litigation, even when he does not prevail on all issues,"[37] in order to recover attorneys' fees. To require plaintiffs to meet an additional and unnecessary requirement is unjust and would have a chilling effect on the vigorous enforcement of citizens' rights. The higher burden of "significant" relief contained in the Legal Fees "Equity" Act will deny deserving plaintiffs their fee awards and curtail private citizen enforcement of constitutional and federal laws.

B. By Giving Courts The Discretion To Reduce Or Deny Fees Where The Fees "Unreasonably Exceed The Value Of Injunctive Relief," S. 1580 Will Discourage Suits For Violations Of Rights That Can Only Be Redressed By Injunctive Relief

Section (6)(b)(2)(A) of the proposed bill will allow courts to reduce or deny attorneys' fees to victorious plaintiffs when the fees requested unreasonably exceed the monetary result or value of the injunctive relief achieved in the proceeding. Section (6) of the proposed bill thus attempts to link the fee award directly to the monetary value of the relief provided.

This provision of the Legal Fees "Equity" Act contravenes the central purpose of fee-shifting statutes: to encourage private enforcement of civil rights and other public interest laws. If successful plaintiffs were routinely forced to bear their own attorneys' fees or to have them reduced because the equitable relief obtained was viewed as minimal, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. By its very nature, equitable or injunctive relief cannot be quantified in monetary terms. Indeed, injunctive relief is only awarded when monetary relief is inadequate to compensate a plaintiff,[38] and thus, in a technical sense, injunctive relief has no quantifiable monetary "value." Where no monetary relief is sought, the attorneys fees requested, which are quantified in monetary terms, may always be considered to "unreasonably exceed" the "value" of injunctive relief, which has no monetary "value." Plaintiffs will thus arbitrarily be denied fees because of judges' decisions, based purely on subjective criteria, that requests for fees "unreasonably exceed" the value of injunctive relief. As a consequence, plaintiffs seeking injunctive relief will be unable to guarantee their attorneys any fees and will be deterred from bringing suits altogether.

Moreover, by focusing on the economic value of a particular case, one may completely miss its importance. For example, in Pugh v. Rainwater,[39] the plaintiff successfully challenged the constitutionality of the state's practice of holding persons in custody solely upon a probable cause determination made by state attorneys. Despite the fact that no monetary relief was given, the court granted a fee award of $90-100 per hour because:

> Without doubt, the time claimed represent[ed] a reasonable expenditure of effort for a case of this magnitude.... [This case] was a novel and difficult case from a substantive and procedural viewpoint.... This is perhaps the most significant case to come out of the Southern District Court in the last decade.[40]

The proponents of this bill simply do not understand that the fundamental citizens' rights that fee-shifting statutes effectuate, cannot be measured solely in monetary terms. This misunderstanding stems from an even more basic misconception of the purpose of fee-shifting statutes. Fee-shifting statutes are designed to allow the bringing of suits for violations of fundamental rights that otherwise would not be brought. These suits would not otherwise be brought because the plaintiffs whose rights are violated are often poor and the relief sought is often injunctive, involving at most minimal dollar damages. By allowing judges to reduce or deny fees whenever they would "unreasonably exceed the value of injunctive relief", this bill will simply subvert the purpose and meaning of fee-shifting statutes and give the government a signal that violations of citizens' rights will not be prosecuted.

C. The Elimination Of Fee Awards Against Government Intervenors Who Protract Litigation And Upset Consent Decrees, Will Unfairly Shield The Federal Government From Liability

Section 4(d) of the proposed bill states that, "no award of attorneys' fees or related expenses shall be made under a federal fee shifting statute against a party who has intervened to defend the validity of a law or action of the United States, or a state or local government, and who has not been found to have violated a constitutional or statutory right of the party seeking the award." This section would deny plaintiffs any fees against federal, state and local governments who unsuccessfully intervene in an action even though their very presence in the litigation supplements the defense effort and creates additional burdens for the plaintiffs. Although this provision will shield all intervenors from fee awards, it was inserted in this year's bill primarily to amend existing case law, in order to shield the federal government from liability when they unsuccessfully intervene in an action either to protract litigation or to set aside a consent decree.[41]

Intervenor-defendants often litigate cases more vigorously than do the named defendants. Thus, in view of their litigation posture, under current law losing intervenor-defendants are routinely held liable for fees and assessed their proportionate share.[42] Moreover, intervenor-defendants sometimes act separately and alone in defense of unlawful government action. When intervenor-defendants litigate independently as well as when they appeal alone unsuccessfully, they are held liable for fees.[43] Thus, when the government acts independently to support illegal actions, and thereby causes a plaintiff to spend further time and resources in proving her case, it too should be and is held liable for fees. But if S. 1580 is enacted, government-intervenors will never be liable for fees.

Increasingly, the Justice Department - the drafter and chief proponent of S. 1580 - is participating in litigation in order to challenge voluntary affirmative action plans and to set aside consent decrees, even where the original defendants have already agreed to a settlement. For example, in Williams v. New Orleans, the Justice Department sought to intervene at the appellate level to challenge a voluntary police promotion program that had already been approved by a federal district court.[44] Similarly, in Gary W. v. State of Louisiana,[45] a case involving the civil rights of institutionalized persons, the Justice Department opposed a proposed settlement offer that had already been agreed to by the defendants.[46] In both of these instances, the federal government's participation jeopardized the settlement agreement and greatly prolonged the litigation. Surely, where the federal government intervenes in litigation to upset a settlement agreement or a consent decree, and thereby prolongs the proceeding and requires plaintiffs to litigate an action they otherwise would not have to litigate, they should be liable for the victorious plaintiffs' attorneys' fees.

Federal, state and local governments should not be encouraged or allowed to intervene in litigation to unnecessarily wear down plaintiffs, protract litigation and set aside consent decrees without fear of fee assessments. Further, plaintiffs should not have to bear the financial burden of unsuccessful government intervention to support illegal actions. But if the Legal Fees Equity Act is enacted, these very consequences are inevitable.

D. Requiring A Plaintiff's Attorney To Wait For Fees Until A Final Decision Is Entered In A Case, Even Where The Plaintiff Has Prevailed On An Important Preliminary Issue, Will Deter Attorneys From Representing Plaintiffs In Protracted Litigation

Section 7(a) of the proposed bill states that, "a party may seek an award of attorneys' fees and related expenses only within thirty days after a final decision by the court or agency...." A final decision is defined as a "final judgment by the court or a final order by an agency, in which a party establishes entitlement to relief on the merits..." Section 7(a) of S. 1580 will deny plaintiffs any interim fees, even when they have won a judgment on an important preliminary issue. This provision of the Act deviates from current law and will deter attorneys from representing plaintiffs in protracted litigation, where it may take years for the court to structure a remedy or reach a final decision on damages.

Under current law, a plaintiff who wins a judgment on an important preliminary issue in a case may be entitled to an immediate award of attorneys' fees.[47] Thus, for example, if a plaintiff brings a school desegregation suit and the court finds that the school district was illegally and unconstitutionally segregated, the plaintiff can be awarded interim fees and will not have to wait the years it might take for the court to structure a remedy and enter a final decision in the case before she can collect any fees.

The practice of awarding interim fee awards where a party has prevailed on an important preliminary matter in the litigation has been specifically approved by Congress[48] and the Supreme Court.[49] Interim fee awards are crucial in protracted litigation, when it may take years for a final order to be entered in a case. Without interim fees, plaintiffs' attorneys might simply run out of the money and resources necessary to continue representing their clients, thereby leaving the plaintiffs with nothing.

Nonetheless, the Legal Fees "Equity" Act will unjustly deny plaintiffs interim fees where they have won a judgment on an important preliminary issue. Consequently, lawyers will be severely deterred from becoming involved in protracted litigation. This provision is even more grossly inequitable when one considers that government attorneys and government hired outside counsel, unlike plaintiffs' attorneys, are paid regularly throughout the course of litigation, win or lose. This provision, as well as many others, will simply make it impossible and unaffordable for plaintiffs to redress government violations of constitutional and federal law.

E. The Legal Fees "Equity" Act Will Give Judges Unbridled Discretion To Second Guess Attorneys' Litigation Strategies And To Decrease Or Deny Fees To Victorious Plaintiffs

The Legal Fees "Equity" Act contains a number of provisions that contrast sharply with the ostensible intent of the bills' proponents to "standarize" fee awards[50] and instead provides judges with almost unlimited discretion to reduce or deny fee awards. Nearly every provision of this bill will reduce the amount of fees that plaintiffs can recover, even when they overwhelmingly prove that the government has violated a fundamental right.

For example, Section 5(B) of the proposed bill will allow a judge to reduce or deny a fee award if she feels that the time and legal services spent were "otherwise unnecessary" with regard to the nature of the controversy. Further, Section 6(b)(2)(B) of the proposed bill will allow a judge to reduce or deny a fee where it "would otherwise be appropriate." These provisions are dangerous. They will allow a judge to decide in retrospect whether an attorney read one too many cases or took one too many depositions. Quite simply, these provisions will allow a judge to deny fee awards altogether if she decides that she did not like the way a lawyer prepared a case.

Allowing courts this kind of unbridled discretion will put attorneys in a very precarious position. No attorney knows for sure what exact piece of evidence will sway a jury, board or judge. It is all but impossible for an attorney to evaluate whether it is "appropriate" or "necessary" to read another case or to depose another witness. Moreover, judges who are hostile to civil, consumer, or environmental rights will be able to use provisions such as 5(B) and 6(b)(2)(B) to further reduce fees, or to deny them altogether. The danger of letting judges make these kinds of determinations is obvious. Any attorney will be deterred from taking a case where a judge might completely deny fees upon deciding that, in retrospect, she did not like the way the attorney prepared the case. This bill will dampen citizen enforcement of private rights and eliminate any deterrent against violations of those rights.

III. THE LEGAL FEES "EQUITY" ACT CONTAINS NO STANDARDS AND WILL CREATE CONFUSION AND PROTRACTED LITIGATION FOR THE COURTS

The proponents of the Legal Fees "Equity" Act claim that this bill will provide standards for applying fee-shifting statutes where none currently exist.[51] This proposition is wrong in every respect.

There is no absence of standards in the application of federal fee-shifting statutes. On the contrary, Congress, after extensive hearings, gave detailed and explicit guidance as to when fees should be awarded and as to how they should be computed.[52] Further, the courts have consistently implemented these guidelines.[53] Repeatedly, the courts have looked to and applied the extensive guidance set forth by Congress in the legislative history that accompanied the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988, by far the most frequently invoked fee shifting statute.[54] Under current law, when a plaintiff prevails in litigation by proving that the government has violated the law, she is entitled to receive *reasonable* attorneys fees.[55] All petitions for fees must be supported by evidence and are thoroughly analyzed by a court before it decides what fees are reasonable.[56] The vast majority of disputes over the proper amount of fee awards are factual, not legal in nature, and therefore will not be resolved by this bill.

Moreover, this bill does not provide any standards. The only "standards" provided by this bill are the $75 per hour cap and the blanket elimination of all upward adjustments from the computation of fee awards. Because so many of the bill's provisions either require or allow judges to lower fees, $75 per hour is by no means a standard but is only a starting point. Indeed, D. Lowell Jensen, Deputy Attorney General of the United States and the Reagan Administration's witness who testified in favor of this bill, admitted in response to questioning by Senator Grassley on October 8, 1985, that the bill provides no standards and that case by case litigation will be required in order to interpret its provisions. In short, the Legal Fees "Equity" Act will neither provide standards nor guide courts in determining fee awards, and its real purpose is simply to create barriers designed to discourage the enforcement of important federal laws and congressional policies.

A. The Legal Fees "Equity" Act Is Unworkable Because It Contains Numerous Ambiguous Definitions Which Will Create Confusion And Protracted Litigation For The Courts

The proponents of the Legal Fees "Equity" Act would like Congress to believe that this bill will create standards for courts to follow in deciding attorneys' fees questions. It will not.

Terms such as "significant relief," "redundant," "excessive," "otherwise unnecessary," and "reduction where otherwise appropriate" are vague and confusing at best.[57] It is anybody's guess when a reduction in fees would be "otherwise appropriate", or how much relief must be granted before it will be deemed "significant", or which legal services are "redundant", "excessive", or "otherwise unnecessary." The only thing clear about these terms is that they will give judges the discretion to reduce or deny attorneys' fees to victorious and deserving plaintiffs. Each of these terms will have to be defined by courts through potentially protracted litigation, with great room for inconsistent interpretation. Indeed, the passage of this bill could create a mess of the entire attorneys' fee award system.

The likelihood of extensive litigation and inconsistent interpretation is even greater when one considers that there are over one-hundred fee-shifting statutes and that each of these statutes incorporates a particular congressional policy and standard of recovery. Nonetheless, the Legal Fees "Equity" Act would apply blanket ambiguous "standards" to all of the fee-shifting statutes.

Moreover, because this bill contains no real standards, and gives courts broad discretion to reduce fee awards, defendants will fight harder and longer for reduced fees. Government-defendants are already reluctant to pay attorneys' fees, and frequently involve the courts in long battles while opposing fee awards to victorious plaintiffs.[58] The Supreme Court has stated twice in granting fees over the government's opposition, that a "request for attorneys' fees should not result in a second major litigation."[59] Yet the Legal Fees "Equity" Act will invite losing government-defendants to engage in increased litigation. Thus, passage of the proposed bill will result in a deluge of "second major litigations" over fees and will be a disaster for the entire judicial system.

B. The Legal Fees "Equity" Act Will Eliminate All Common Law Exceptions To The American Rule And Will Allow Government-Defendants To Defy Court Orders And Act In Bad Faith Without Fear Of Fee Assessments

Section 4(b) of the proposed bill provides that no award of attorneys fees shall be made against government-defendants except as expressly authorized by statute. This section contravenes the Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society.[60] In Alyeska, the Supreme Court elaborated three common law exceptions to the "American Rule" that each party must bear the expense of its own fees. These exceptions allow a court to: (1) enforce its own orders by assessing fees for the willful violation of a court order, (2) award fees against a losing party that has acted in bad faith, and (3) award fees in commercial litigation to plaintiffs who have recovered a "common fund," usually on behalf of a class.[61] These exceptions are essential in giving courts the power to control willful violations of court orders and bad faith actions on the part of litigants. Yet this bill will eliminate these important exceptions.

Thus, in a case not governed by a fee shifting statute, under the Act, a state government-defendant could willfully prolong litigation in order to continue unlawful practices, and a court would be powerless to assess fees against it. Further, even in a case covered by a fee-shifting statute, a court would be unable to assess fees against a government-defendant for bad faith actions unless the plaintiff was able to demonstrate that the government's bad faith actions were directly related to the "significant issues" on which the plaintiff ultimately prevailed. In such cases, federal, state and local governments will be free to ignore court orders and wear down plaintiffs with bad faith actions without the fear of fee assessment. Federal, state and local government will thus be encouraged to make a mockery of the judicial system and to manipulate plaintiffs.

In addition, Section 4(b) of the proposed bill conflicts with the Federal Rules of Civil Procedure, which allow judges to award fees for delay or abuse.[62] These rules promote efficient use of judicial resources and punish bad faith attempts to undermine the litigation process. The drafters of this bill apparently intend to free government-defendants from these constraints and to deny courts the means to control reprehensible conduct on the part of government counsel.

IV. THE LEGAL FEES "EQUITY" ACT WILL ENCOURAGE IRRESPONSIBLE CONDUCT ON THE PART OF ATTORNEYS

Various provisions of the Legal Fees "Equity" Act will discourage lawyers from zealously representing their clients and will encourage the use of imprudent litigation tactics on behalf of government-defendants. Thus, this bill will encourage attorneys to act in ways which may contravene their legal and professional ethics. A bill which encourages such repugnant actions should not be passed.

A. Because Plaintiffs Can Only Receive Fees For Work On The "Significant Issue" On Which They "Prevail", Attorneys Will Be Reluctant To Pose Alternative Arguments Which May Help Their Clients

The Legal Fees "Equity" Act will discourage innovative lawyering and will penalize lawyers for zealously representing their clients. Section 5(2)(A) of the Legal Fees "Equity" Act, if adopted, would require that a party otherwise entitled to receive attorneys' fees and related expenses establish that the work to be compensated was performed in connection with the very issue on which the party prevailed. However, under the Act, a party will be deemed prevailing only when he or she succeeds on a "significant issue". Courts often decide cases by ruling on only one or two issues. It seems difficult to see how a court will determine that an alternative issue was "significant," when it has not ruled on that issue. Therefore, an attorney will not receive any fees for work performed on other viable claims related to the claim on which he or she prevailed.

The Legal Fees "Equity" Act differs from current law and will penalize an attorney for acting in conformity with legal and professional ethics. Under existing law, a plaintiff who has won substantial relief can collect fees for work performed on viable and related claims even though the court has not adopted every contention raised or ruled on every claim.[63] This encourages an attorney to vigorously represent his or her client by raising every viable argument that may be successful for the client, while it discourages an attorney from litigating unrelated and frivolous claims. The Legal Fees "Equity" Act, on the other hand, will deny the successful plaintiff fees for work done on viable and related claims in suits where he has won substantial relief. Therefore, under the Legal Fees "Equity" Act, attorneys will be forced to select and confine their efforts to the single issue they firmly believe has the highest chance of success. Attorneys will be deterred from posing alternative arguments and novel theories of law because they will run a great risk that they will not receive any fees for work performed on those issues. This will be true even if the related claims are of great merit and deserve the attorneys' attention. Thus, the Act will have a chilling effect on attorneys who would otherwise propose untested theories of law and raise every legal claim that might be successful for their clients.

If an attorney does persist in developing every issue and novel theory in order to act within his or her obligation under the Code of Professional Responsibility,[64] he will probably be denied fees for most of the work performed. Thus, this bill will penalize a lawyer for acting in conformity with legal and professional ethics, will be grossly inequitable and will result in less vigorous enforcement of citizens' rights.

B. The Legal Fees "Equity" Act Will Encourage Government-Defendants To Utilize Imprudent Litigation Tactics To Victimize Aggrieved Citizens

The Legal Fees "Equity" Act will encourage irresponsible and unprofessional conduct on the part of government-defendants. As stated previously, the Act contains many provisions that will either heighten the burdens that plaintiffs must meet in order to recover attorneys' fees or allow courts to drastically reduce or deny plaintiffs' fee awards. Thus, plaintiffs will have fewer resources with which to prepare and present their cases and will constantly have to fear that they may be denied fee awards altogether.

Despite the fact that the proposed bill will substantially limit the resources of plaintiffs, it will not limit the amount of resources that the government can expend to defend itself in cases where plaintiffs allege violations of their rights. The government-defendants, unlike the plaintiffs, will be able to hire outside counsel at any cost, will be compensated for law clerk and paralegal time, and will be able to guarantee its attorneys payment for all of the work they perform on a case, win or lose.

The imbalances and inequities that will be created if the Act is passed will both encourage irresponsible conduct on the part of government-defendants and provide the government with an incentive to violate fundamental rights. For example, under the Legal Fees "Equity" Act, government-defendants will be encouraged to litigate every point and raise every argument imaginable in the hope that a plaintiff will simply have to give up due to a lack of financial resources. While government hired counsel will get paid for the work they perform on every issue in the litigation, plaintiffs' attorneys will get paid only for the hours they expend on the "significant" issues on which they "prevail." Plaintiffs' attorneys will not receive fees for the work they perform on the many issues the government-defendants may raise which are not significant to the central issue in the case. Therefore, government-defendants will litigate every point and raise every argument to wear down plaintiffs' attorneys, knowing the attorneys will be unable to collect fees for the time they spend combating the government's insignificant arguments.

Moreover, because Section 4(b) of the proposed bill will eliminate all common law exceptions to the American rule and prevent courts from assessing fees against government-defendants for bad faith actions, government-defendants will have an incentive to raise frivolous claims. Thus, the proposed bill, if enacted, will encourage government-defendants to utilize their superior resources and to hire high-priced outside counsel, in order to victimize aggrieved plaintiffs and force them to discontinue their litigation.

The proposed bill will also provide a windfall to government agencies, who will have less incentive to end discriminatory practices or settle meritorious cases. Under the Legal Fees "Equity" Act, the government-defendants can rest secure that plaintiffs will settle meritorious actions for next to nothing, because under the proposed bill plaintiffs will run numerous risks of not recovering any fees at all. Thus, the government-defendants will get away with proposing unreasonable settlement offers which plaintiffs will be forced to accept -- because of a constant fear that courts will either reduce fees or deny them altogether.

No legislation should encourage irresponsible conduct on the part of attorneys. Moreover, no legislation should encourage government-defendants to utilize imprudent litigation tactics and to violate this Nation's constitutional, civil, environmental and consumer laws. The Legal Fees "Equity" Act, guised in terms of "clarification" and "standardization," seeks to undermine laws vital to our society. S. 1580 is anti-plaintiff and should not be passed.

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FOOTNOTES

[1] Members of the Alliance for Justice include: Advocates for Public Interest, Business and Professional People for the Public Interest, the Center for Law and Social Policy, the Center for Law in the Public Interest, the Center for National Policy Review, Center for Public Representation, the Center for Science in the Public Interest, Consumers Union, the Education Law Center, the Employment Law Center, the Environmental Defense Fund, Equal Rights Advocates, the Food Research and Action Center, Harmon & Weiss, the Institute for Public Representation, the Juvenile Law Center, the Mental Health Law Project, National Education Association, the NOW Legal Defense and Education Fund, the National Wildlife Federation, the National Women's Law Center, the Native American Rights Fund, the Natural Resources Defense Council, New York Lawyers for the Public Interest, Public Advocates, Inc., Roisman, Reno, and Cavanaugh, the Sierra Club Legal Defense Fund, the Women's Law Project, and the Women's Legal Defense Fund.

[2] Table C, appended to the Department of Justice's testimony on S. 2802 last year, is a list of fee awards in the District of Columbia, including several antitrust actions, during the years 1973 to 1984. The Government's own figures show a very predictable pattern: that fees have risen, but very slowly. Excluding $5 and $10 per hour awards to *pro se* litigants, the following chart shows how slowly rates have advanced and how small they actually are. Further, as noted in this statement, *See* footnote 17, the fees awarded in antitrust cases generally far exceed those awarded in civil rights cases.

Year	Average Fee Award	Median Fee Award
1976	$49.82	$50.00
1977	55.79	55.58
1978	67.91	60.00
1979	64.00	62.50
1980	66.25	75.00
1981	70.54	67.50
1982	76.22	75.00
1983	86.98	75.00
1984	96.05	85.00

Chart D, a list of fee awards made against state and local governmental entities in the years 1977 to 1983, reveals the same slow upward trend that Chart C reveals. Chart D Shows:

Year	Average Fee Award	Median Fee Award
1977	$49.00	$47.50
1978	43.75	45.00
1979	60.80	50.00
1980	61.95	50.00
1981	70.83	75.00
1982	79.23	75.00
1983 (one case)	67.50	67.50

The Legal Fees Equity Act, 1984: Hearings on S. 2802 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 2nd Sess. 83-104 (1984) (Statement of Carol E. Dinkins, Deputy Att'y Gen., U.S. Dept. of Justice).

3 Under the Legal Fees "Equity" Act, $75 per hour is the maximum amount a court could award to a *victorious* plaintiff. Many provisions of this bill, which will be discussed herein, would allow or require judges to further reduce fees. In short, very few attorneys will be eligible to recover attorneys' fees of even $75 per hour.

4 S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976). *See also*, *Blum v. Stenson*, 465 U.S. 866, 79 L.Ed.2d 891, 898-900 (1984).

5 H. Rep. 94-1558, 94th Cong., 2d Sess. 3 (1976).

6 S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976).

7 Testimony of Francis X. Belloti, Attorney General of Massachusetts, 12 (October 8, 1985); Testimony of Jim Jones, Attorney General of Idaho, 6 (October 8, 1985).

8 *See* brief *amici curiae* of States of Alabama, Alaska, *et. al.*, *Illinois v. Sangamo Construction Company*, 657 F.2d 855 (7th Cir. 1981).

9 *Id.* at 5.

10 *Id.*

11 *Id.* at 7.

12 *See*, *e.g.*, The Legal Fees Equity Act, 1984: Hearings on S. 2802 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 2nd Sess. 674-78 (Statement of the Alliance for Justice); *id.* at 376-393 (1984) (Statement of Charles Victor McTeer, Attorney, Greenville, MS.).

13 *See* Lauter, U.S. Paid $50 million to Private Firms, Nat'l Law J., Feb. 4, 1985, at 52; Lauter, Bill Would Place Cap on U.S. Legal Fees, Nat'l Law J., Sept. 2, 1985, at 9.

14 *Id.*

15 *Id.*; Lauter and Middleton, Bank Failures Spark Millions in Legal Fees, Nat'l Law J., Feb. 4, 1985 at 53.

16 The fee awards requested often exceed $75 per hour. *See*, *e.g.*, *In Southern Ohio Coal Co. v. Federal Mine Safety and Health Review Commission*, No. 83-2046 (August 27, 1984, D.C. Cir.), where the federal government sought and recovered fees of $90 and $110 per hour.

17 A recent survey of antitrust and securities cases found that the average base hourly rate (before any adjustments for inflation or other contingencies were made) for all attorneys regardless of experience or expertise in antitrust and securities class actions over a period of years up to 1980 was $92.50 per hour. Fees for

attorneys with more experience were significantly higher and after adjustments the average fee was over $200. *Attorneys Fee Awards in Antitrust and Securities Class Actions*, 6 Class Action Reports, 82 (1980).

With regard to civil rights cases, the most comprehensive survey of fees in Title VII cases demonstrates that rates were as low as $5 per hour, with most awards between $35-$75 per hour. This survey covered approximately the same period of time as the antitrust and securities survey. Schlei & Grossman, *Employment Discrimination Law* (2nd Ed. 1983).

18 *See*, *e.g.*, *State of Arizona v. Maricopa County Medical Society*, 578 F. Supp. 1262 (D. Ariz. 1984) (fees up to $140 per hour, plus multiplier of 1.4, for effective hourly rates of up to $196); *In re Fine Paper Antitrust Litigation*, 98 F.R.D. 48 (E.D. Pa. 1983) (market rates of up to $90 per hour, plus multiplier of 1.5, for effective hourly rates of up to $135); *In Re Cement and Concrete Antitrust Litigation*, 1980-81 CCH Trade Cas. ¶63,797 (D. Ariz. 1980) (market rate of up to $125 per hour, plus multiplier of 2.85, for effective hourly rates of up to $356.25).

19 *See* The Legal Fees Equity Act, 1984: Hearings on S. 2802 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 2nd Sess. 395 (1984) (Statement of Charles Victor McTeer, Attorney, Greenville, MS.)

20 S. 1580, 99th Cong., 1st Sess., 131 Cong. Rec. 10882 (1985) (section-by-section analysis of S. 1580 by the Department of Justice).

21 Under the "hourly salary" provision of Section 6(B)(1)(b) of the proposed bill, an attorney will generally not be eligible to recover fees in excess of twice his or her "hourly salary". Thus, in order to recover $75 per hour, an attorney would have to make $37.50 per hour, or half of $75.00. For an attorney to have an hourly salary of $37.50 per hour, that attorney would have to be paid approximately $78,000.00 per year.

22 *See* brief *amici curiae* of States of Alabama, Alaska, *et*. *al*., *Illinois v. Sangamo Construction Co.*, 657 F.2d 855 (7th Cir.) 1981.

23 *See*, *e.g.*, H. Rep. 94-1558, 94th Cong. 2d Sess 8 (1976).

24 *See*, *e.g.*, *Blum v. Stenson*, 465 U.S. 866 (1984).

25 *See Blum v. Stenson*, 465 U.S. 866 (1984).

26 *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 6 n.28 (D.C. Cir. 1982).

27 *See supra*, notes 8-11 and accompanying text.

28 *Id*.

29 *Id*.

30 For an excellent discussion of the effects that the $75 fee cap and the elimination of upward adjustments will have on private plaintiffs' attorneys, *See* Testimony of Philip G. Sunderland, S. 1580, "The Legal Fees Equity Act" (Oct. 29, 1985), which is a part of the record being considered by this Subcommittee.

31 *See*, *e.g.*, *Jordan v. United States Department of Justice*, 691 F.2d 514 (D.C. Cir. 1982). *Davis v. County of Los Angeles*, 8 E.P.D. §9444 (C.D. Cal. 1974).

32 Congress has created a limited number of well-defined exceptions to the general rule that a plaintiff must prevail on the merits in order to be eligible to recover some fees. Under §307 of the Clean Air Act, for example, a plaintiff can recover fees as long as she achieves "a modicum of success on the merits."

See, *e.g.*, *Sierra Club and Natural Resources Defense Council v. EPA*, No. 82-1412, slip op. at 4-5 (D.C. Cir. 1985).

33 461 U.S. 424 (1983).

34 *See*, *e.g.*, *Nadeau v. Helgemone*, 581 F.2d 275 (1st Cir. 1978); *Gagne v. Maher*, 594 F.2d 336 (2nd Cir. 1979); *Bagby v. Beal*, 606 F.2d 411 (3rd Cir. 1979); *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979); *Ramos v. Koebig*, 638 F.2d 838 (5th Cir. 1981); *Northcross v. Bd. of Educ.*, 611 F.2d 624 (6th Cir. 1979); *Dawson v. Pastrick*, 600 F.2d 70 (7th Cir. 1979); *Kimbrough v. Arkansas Activities Ass'n*, 574 F.2d 423 (8th Cir. 1978); *Sethy v. Alameda County Water Dist*, 602 F.2d 894 (9th Cir. 1979); *Chicago Police Officers Ass'n v. Stover*, 624 F.2d 127 (10th Cir. 1980); *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974).

35 *See*, *e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

36 *See*, *e.g.*, D. Dobbs, Remedies, Damages-Equity-Restitution, 57-68 (1976).

37 *See*, *e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983). *See also*, S. Rep. 94-1011, 94 Cong., 2nd Sess. 5 (1976).

38 *See supra* note 36.

39 *Pugh v. Rainwater*, 465 F. Supp. 41 (S.D. Fla. 1979).

40 *Id.* at 44-45.

41 That this is the intent of the provision is obvious both from the redefinition of "party" in Section 3(5) of S. 1580 to include the "United States" (so that no fees will be recoverable from the United States when it is an "intervening party), and from the significant increase in the number of instances in which the Department of Justice is now intervening in state or local matters to challenge affirmative action plans and consent decrees. S. 2802, the Legal Fees "Equity" Act considered by this Subcommittee last year, explicitly excluded the United States and state and local governments from the definition of "party". S. 2802, 98th Cong., 2nd Sess. 53(5) (1984).

42 *See*, *e.g.*, *Burney v. Housing Authority of Beaner*, 735 F.2d 113 (3d Cir. 1984); *Akron Center for Reproductive Health v. Akron*, 604 F. Supp. 1268 (N.D. Ohio 1984).

43 *Haycraft v. Hollenbach*, 606 F.2d 128 (6th Cir. 1979); *Moten v. Bricklayers International Union*, 543 F.2d 224 (D.C. Cir. 1976).

44 *Williams v. New Orleans*, No. 82-3435 (5th Cir.).

45 *Gary W. v. State of Louisiana*, C.A. No. 74-2412 "C" (E.D. La. 1983).

46 Ironically, the Justice Department initially entered *Gary W.* as an advocate for the plaintiffs. Only once the Reagan Administration took office did it essentially switch sides and become a guardian of the defendants' interests. *See American Civil Liberties Union, In Contempt of Congress and the Courts: The Reagan Civil Rights Record*, 3 (1984).

47 *See*, *e.g.*, *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

48 S. Rep. 1011, 94th Cong., 2nd Sess. 5 (1976); 26 H.R. Report No. 1558, 94th Cong., 2d Sess. 8 (1976).

49 *See supra*, footnote 47.

50 *See* S. 1580, 99th Cong., 1st Sess., §2, 131 Cong. Rec. 10876 (1985); *id*. at 10879 (Department of Justice's section-by-section analysis). *See also*, Testimony of Francis X. Bellotti, Attorney General of Massachusetts, 5 (October 8, 1985); Statement of Senator Orrin G. Hatch, 4 (October 8, 1985).

51 *Id*.

52 *See*, *e.g.*, S. Rep. No. 1011, 94th Cong., 2d Sess. (1976) and H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976).

53 *See*, *e.g.*, *Blum v. Stenson*, 465 U.S. 866 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (both cases rely on Congressional intent and specifically refer to the Senate and House Reports).

54 The American Civil Liberties Union's Statement on S. 1580, which is a part of the record being considered by this Subcommittee, provides an accurate and more comprehensive discussion of the extensive guidance that Congress provided, and of the courts' consistent application of fee-shifting statutes. *See*, Statement of the American Civil Liberties Union by E. Richard Larson, S. 1580 "The Legal Fees Equity Act", 12-17 (Oct. 29, 1985).

55 *See*, *e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Hannahan v. Hampton*, 446 U.S. 754 (1980); *Blum v. Stenson*, 465 U.S. 866 (1984).

56 *See*, *e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (An applicant for fee awards bears the burden of establishing entitlement to a fee award and the District Court must provide a concise but clear explanation of its reasons for the amount of the award).

57 *See* Proposed Bill S. 1580, Sections 3(9), 5(2)(B), 6(b)(1)(C), 5(B), 6(b)(2) B, respectively. Other terms contained in S. 1580 are equally ambiguous. For example, how strong must a factor be before it will be termed "material?" §8(1)(B).

58 *See*, *e.g.*, *Hutto v. Finney*, 437 U.S. 678 (1978); *Maher v. Gagne*, 448 U.S. 122 (1980). In both of these cases, the government-defendants unsuccessfully challenged the award of attorney's fees to victorious plaintiffs all the way to the Supreme Court. These are but two of many examples of government-defendants' resistence to fee awards.

59 *See Hensley v. Eckhart*, 461 U.S. 424 (1983), *quoted with approval in Blum v. Stenson*, 465 U.S. 866.

60 421 U.S. 240 (1975).

61 *Id*. at 258-259.

62 *See* Federal Rules of Civil Procedure 7, 11, 16(f), 26(g), 37 and 56(g).

63 *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).

64 Model Code of Professional Responsibility, Canon 7 (1984).

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October 29, 1985

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The Honorable Orrin B. Hatch
Chairman, Subcommittee on the
  Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20516

Re: "The Legal Fees Equity Act" (S. 1580)

Dear Senator Hatch:

On behalf of The Washington Council of Lawyers, I am writing to strongly urge the Subcommittee not to report out S. 1580. The Council is a voluntary, bi-partisan bar association that has sought, since its creation in 1971, to promote public service and public interest activities within the Washington, D.C. legal community. Our membership includes attorneys from large and small private law firms, government agencies, legal services programs, civil rights and other public interest organizations. The Council submitted testimony in opposition to similar legislation (S. 2802) last year,*/ and strongly oppose S. 1580 for the same reasons. S. 1580 would place virtually insurmountable obstacles in the path of reasonable attorneys' fees awards, thereby seriously undermining private enforcement of the nation's civil rights, environmental and related laws.

There are at least four important and related reasons why S. 1580 should not be reported by the Subcommittee.

First, S. 1580 would place numerous ill-defined and unreasonable obstacles in the path of adequate compensation for counsel. For example, the bill would require a plaintiff to obtain "significant relief," in order to obtain *any* fees and would eliminate fees entirely in settled or mooted cases. The "significant relief" standard is vague and would overrule hundreds of cases which have established with certainty the threshold requirements to obtain attorneys' fees. The Justice Department's section-by-section analysis of S. 1580 suggests such a high standard for "significant relief" that it is unlikely that fees will be available in most meritorious civil rights cases.* */ Moreover, the prohibition on fees in mooted or settled cases ignores the enormous benefits that may be obtained by counsel without the need for a trial and could serve to discourage settlements.

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*/ *See* The Legal Fees Equity Act: Hearings on S. 2802 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 2d Sess. 473-79 (1984) (Testimony of the Washington Council of Lawyers).

* */ For example, the Justice Department lists *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071 (D.C. Cir. 1984) as a case where the results were not sufficiently "significant." In *Laffey*, the plaintiffs prevailed on all fourteen of their charges of violations of Title VII and the Equal Pay Act, winning over $50 million and far-reaching injunctive relief for the class.

Second, the $75 per hour cap on attorneys' fees is insufficient to make civil rights and other fee-shifting litigation against the government competitive in the legal marketplace. The cap has no relation to the actual price of legal services and is far below the prevailing rate in most jurisdictions. While S. 1580 would impose that $75 per hour limit on outside counsel retained by the federal government, it would not apply to counsel hired by State and local governments. This would lead to a serious imbalance of resources since State and local governments would remain free to retain high-priced outside counsel, while civil rights plaintiffs' attorneys who prevail against State and local governments would be limited to $75 per hour. It is also inappropriate for Congress to impose a $75 per hour limit at the same time that the U.S. Attorney for the District of Columbia has abandoned this artificial cap, recognizing that it is unrealistic and unworkable.

Third, elimination of the district court's discretion to adjust the lodestar rate will further assure that civil rights and other litigation against Government will not be competitive in the marketplace. We stress that an adjustment to the lodestar is not a "bonus." Rather, it is a necessary payment to make a contingent case attractive to an attorney who is not guaranteed a fee. When artificially low rates are combined with no possibility of an upward adjustment, it becomes a virtual certainty that competent counsel will not find it economically possible to handle civil rights litigation.

Fourth, there is no basis for reducing a fee award simply because the plaintiffs' attorney is employed by a civil rights or other public interest organization. This provision would drastically change existing law, under which attorneys for public interest organizations are awarded attorneys' fees at market rates, *see Blum* v. *Stenson*, 104 S. Ct. 1541 (1984). It would provide a "windfall" to violators of civil rights and other laws, who could benefit simply by the fortuity of the identity of plaintiffs' counsel. Award of full market fees to civil rights and other public interest organizations is an important deterrent to unlawful behavior by defendants and provides public interest organizations with necessary funds to continue private enforcement.

In sum, the Council continues to vigorously oppose legislation which would permit governments to violate the nation's laws at bargain rates, and, in many cases, would make it economically infeasible for the victims of those violations to vindicate their rights. Existing law provides for awards at market rates, which are necessary to make it economically feasible for individual attorneys and private organizations to fulfill their important role as private attorneys general in enforcing civil rights, environmental, consumer and other laws critical to the public interest. There is no need or justification for Congress to place further limitations on the award of attorneys' fees to counsel who prevail in civil rights and other litigation against the Government.

We urge the Subcommittee not to report S. 1580.

Sincerely,

Richard L. Jacobson

Richard L. Jacobson
President

October 25, 1985
STATEMENT OF J. H. McQUISTON
on S. 1580

McQuiston Associates
Los Angeles, California 90038

Mr Chairman and Members of the Subcommittee:

McQuiston Associates is a "think tank" which has existed for over 25 years. Continuously for many years, the staff has almost exclusively examined the subject matter addressed in this bill. I personally have analyzed thousands of actual cases wherein attorney fees were either awarded or denied.

Having this background, I conclude that S. 1580 offends not only the principles for which the United States strives, but the Constitution as well. S. 1580 will encourage totalitarian acts of our public servants, and will threaten the physical well-being of the Country. S. 1580 is merely a vehicle whereby subversive lawbreakers may evade the just compensation deserved by the parties they injure. None of the anecdotal, "ancient" stories presented by the testimony would justify permitting injured parties to go uncompensated. Those anecdotal stories do not withstand inquiry into their truth, either, not to mention the fact that they are not representative of current jurisprudence.

Furthermore, recent events show that the Executive Branch increasingly refuses to obey or carry out the enactments of Congress. S. 1580 would remove the last means available to Congress for enforcing its laws in the face of an insubordinate Executive Branch, which may mean losing control over spending and promoting government by decree. The risk is too great to permit S. 1580 to become law.

Accordingly, I believe it would seriously jeopardize Congress' self-interest, as well as being unwise and unjust, to enact this bill. It is totally devoid of merit, and its underlying premise is unconstitutional.

The focus of this Statement is to show the immediate danger to Congress itself. But my views on many of the issues in the bill can be found in other Congressional documents. Please also refer to S. Hrng 98-1274 (J-98-134) and S. Hrng 98-208 (J-98-40) in conjunction with this Statement.

Executive's Duty Is to Obey the Law

The Constitution, Art I Sec 8 Cl 18, grants only to Congress the power:

> "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Art II Sec 3 requires of the Executive:

> "he shall take Care that the Laws be faithfully executed"

5 U.S.C. §3331 prescribes that *every* federal employee and serviceman shall *take an oath* (1) to *support* the Constitution and (2) to *faithfully* execute the laws. 28 U.S.C. §544 prescribes that *every* attorney for a federal agent shall take an oath to execute *faithfully* his duties.

So, any agent which is tried and found *not* to have obeyed a law of Congress not only broke the law but *also* committed an offense *against the Constitution*. Congress should not listen to the oily entreaties of those which would perpetrate such *vile* offenses. Constitutional violators shouldn't be allowed to evade what less-culpable offenders will be required to do. And, since when do we permit *criminals* to criticize the salaries of those which bring them to justice?

No Government May Pay for Damages of a Disobedient Agent

The Constitution does *not* permit Congress to condone employee-agents which violate the Constitution, nor may Congress pay for the damages such agents cause. The only expense the Constitution allows Congress to pay in such cases is to prosecute and incarcerate the law violators. And if the executive agent committed an act offending the Constitution, the agent may not be compensated with salary or other emoulment, because a renegade acting under color of law *cannot* represent the United States. See, e.g. *Fed. Crop Ins. Corp v Merrill*, 332 U.S. 380 (1947); *Monell v Department*, 436 U.S. 658, 691-95 (1978); *Doe v D.C*, 697 F2d 1115, 1121 (D.C. Cir 1983)(no respondeat superior); *Krejci v U.S. Army*, 733 F2d 1278, 1282 (7 Cir 1984)(no liability for deceit); *Feres v U.S*, 340 U.S. 135 (1950)(no liability for gross negligence); *City of Newport v Fact Concerts*, 453 U.S. 247, 263 (1981)(taxpayers not liable for agent's bad faith); *Smith v Wade*, 461 U.S. 30 (1983)(agent-lawbreaker solely liable for injury under color of law).

But the compensation to which S. 1580 pertains never was classified in the United States as "damages". It is called "costs", and for good reason. The First Judicial Act, Sec 20, prescribed penalties for bringing suits for damages in which less than $500 was awarded: The winner would be liable for the *loser's* "costs" (including fees). In *Arcambel v Wiseman*, 3 U.S. 306 (1796), the winner tried to include the fees as "damages" to escape the fee assessment because the amount otherwise recovered was less than $500. The Court decided that the $1600 in fees could *not* be so included, because it would emasculate the intent of Sec 20.

Recent cases under the Magnuson-Moss Warranties Act have also addressed the issue and found in the same way, in deciding to permit or deny standing under 15 U.S.C. §2310(d)(3). See, e.g, *Saval v BL Ltd*, 710 F2d 1027 (4 Cir 1983).

Attorney General Chooses to Defend Executive Over Congress

Every attorney general is charged with the duty to expose and prosecute government agents which violate their oaths of office. Congress has enacted numerous laws to that effect, including some which some attorneys general here have rebelled against. Watergate demonstrated how *important* effective prosecution is to the health of this government.

But Watergate also showed that sometimes the United States and Congress will not be served properly by the appointed Attorney General. Sometimes Congress must depend on someone acting as "private attorney general", to do for it what the Attorney General either fails to do or actively resists. Especially this is true if the law violator is part of an executive agency:

> "Unlike the cases involving private or state defendants, the complainants are not merely 'private attorneys general', they are the only attorneys general. DOJ does not sue other federal government agencies * * *." NAACP v Civiletti, 609 F2d 514, 523 (DC Cir 1979), quoting Parker v Califano, 561 F2d 320, 331 (DC Cir 1977).

Not once has any attorney general at any level of government failed to oppose a private attorney general which Congress empowered to enforce the law against a government employee which failed to faithfully execute same. Sometimes the private attorney general was actively assisted by the Attorney General, yet was fanatically opposed by the unit of local government. See, e.g, Ruiz v Estelle, 553 F Supp 567 (1982)(Texas prison system engaged in widespread "cruel & unusual punishment" and deprived persons of "equal protection of laws"; Texas Legislature refused to obey federal court orders).

A private attorney general facing the Attorney General, which though even the lowliest AUSA carries the prestigious aura of the office, must be scintillating and deeply knowledgeable to prevail even in an egregious case. Given the unsavory result of having caught not only the employee, but also possibly the Attorney General, in an unconstitutional posture and defying Congressional law, Congress ought to favor the private attorney general which was willing to expose the employees' perfidy.

S. 1580 is a failure partly because it rejects the foregoing; it favors the government employees which conspired against Congress.

A Congressional Need

Congress needs private attorneys general to remedy injuries to itself: Procurement fraud & waste engineered by government employees DOJ will not prosecute. But limits of Art III prevent most persons from acting on Congress' behalf. For those which may, the Administrative Procedure Act severely restricts their compensation to the bare litigation expense, and even that will not be awarded if Congress is "stingy".

For Congress, the stakes are enormous. A potential recovery of $20 BILLION may cause a deficit reduction of $100 billion per year. But private attorneys general risk a retaliation from the Executive that is so monstrous that their future capability to do business is jeopardized. This is not hypothetical. It has happened. The Executive is determined to crush "whistleblowers" in its drive to establish an "Imperial Presidency". Why should those with the standing offer to help Congress, if Congress would be so ungrateful as to deny them full compensation for expenses? After all, it is Congress which keeps all the "proceeds" from such suits.

A typical case history involved a series of contracts let without competition to the "wrong" source, a mere middleman. The DOD Inspector General was told anonymously (of course) that Redstone knowingly wasted $19 to $28 million on just one item of the millions it procures. A following contract would waste another $4 million. Caught in the act, Redstone was asked by the IG to cancel the wasteful and unlawful contract. After stalling (and making cancellation more difficult) Redstone refused. The IG was ineffective because suit could not be brought by that group. But an appropriate suit by a top-notch private attorney general could have recovered the entire $4 million for Congress, at a probable expense of only $30,000.

Compare this modest expense and maximum recovery, with the $60,000 spent by the IG without any recovery. It is a case of knowing what to do and when to do it. It is not a case of arguing whether $75 per hour will hire an attorney or whether $150 per hour might hire a better one. If "average" is good enough, why couldn't the IG recover the funds?

S. 1580 will drive out the top-notch, successful attorneys Congress needs desperately, and leave the field open to those which will lose while they "gain experience". But while that happens, future recoveries will be jeopardized by the prejudicial case law which will develop. And when the attorneys are finally well-trained, they also won't work for the amounts Congress will offer per S. 1580.

The foregoing is not anecdotal. It was the result of long study and analysis as well as personal experience. Both the Senate and House are now beginning this learning experience in court, thanks to Ameron v Army where in defiance of Congressional law the Army decided to exceed the reasonable contract amount by 20 percent. So far, neither House can make the Army obey the law.

Such suits still are a rarity today. They are very difficult to win, because the attorney general for Congress must be a top expert. The self-interest of Congress should encourage more of them. Congress must not alienate those experts which will be productive for Congress and teach others how to do the same. Above all else, Congress must not present itself as a stingy chiseler.

In Bradshaw v U.S. Dist. Ct., 742 F2d 515 Cir 1984), an injured party filed suit under Title VII and requested the court to appoint counsel. Under 42 U.S.C. §2000e-5(f)(1)(B), the court was authorized to do so, but there was no fund appropriated to pay the compensation. The district court attempted to obey the mandate of the 9th Circuit by appointing a suitable attorney, but without assured payment no attorney would accept:

> "The district court strove for over 13 months to find an attorney who would volunteer to represent Bradshaw. Twenty private attorneys were contacted by either the court or Bradshaw at the court's direction. In addition, help was solicited from the Federal Defenders of San Diego, Inc; the Lawyers Club of San Diego; the Legal Aid Society of San Diego, Inc; the San Diego County Bar Association and its Lawyer Reference Agency; the Southern District Lawyer Representatives to the Ninth Circuit Judicial Conference; the University of San Diego School of Law Legal Clinic; and the United States Attorney. No one would voluntarily assist in the prosecution of Bradshaw's case.
>
> "Chief among the reasons given by attorneys [declining was the lack of] "compensation. Besides the obvious demand on attorney time for the adequate prosecution of a complex employment discrimination case, the costs of discovery were thought prohibitive. * * * The only opportunity for recovery for time and out-of-pocket expenditures would be as a prevailing party under 42 U.S.C. §2000e-5(k). Attorneys also expressed concern about jeopardizing their malpractice insurance coverage and defending against State Bar disciplinary proceedings.

> "* * * When the degree of resistance is so high that attorneys would rather confront the court with questionable thirteenth amendment arguments than provide counsel for an indigent, the helpfulness of coercive appointment is subject to question. There is reason to doubt that an attorney appointed under such conditions would provide representation that would assist either the indigent or the court.
>
> "* * * By saying so we do not mean to suggest that coercive appointments are never proper. In some situations they will be.
>
> "* * * We are disappointed with the California State Bar Association. Because of the difficult issue * * * we sought [their] assistance, requesting an amicus curiae brief. For reasons unknown, the Bar Association failed to respond." Bradshaw at 516-519.

S. 1580 will lower Congress into this cesspool of indifference.

The American Rule, 10 STAT 161 et seq

The U.S. Attorney was prohibited on Feb 26, 1853 (10 STAT 161 et seq) from continuing to collect a compensatory fee bill from the losing party, as was the former practice. Instead, only a nominal attorney fee was permitted to augment the attorney's regular salary and per diem:

> "That in lieu of the compensation now allowed by law to attorneys * * * in the United States Courts, to United States district attorneys, * * the following and no other compensation shall be taxed and allowed."

This statute replaced the "English Rule" specified to be followed in Supreme Court Rule VII, effective from 1791 to 1853. It ostensibly was enacted because prosecutors abused their English-Rule fee privileges. For our analysis here, the point to grasp is that if the Attorney General may not tax fees, then a stand-in for the Attorney General should also be restrained, unless a statute specifically gives permission therefor. Alyeska v Wilderness Society, 421 U.S. 240, 265-66 (1975), implied such because it said that if someone was acting for the government as private attorney general against an ordinary party, the party liable for the litigation expense would not be the loser but would be the government, just as if the Attorney General had litigated.

This general rule is not dependent upon whom the private attorney general defeats. It is only because the Attorney General should have litigated for Congress, that Equity provides liability against the United States.

Nonetheless, because Art I Sec 9 Cl 7 prohibits payments not "appropriated by law", a court could not make a fee award unless Congress prescribed such by statute. Thus even though the United States was not the "loser" in Alyeska, the Court looked to 28 U.S.C. §2412, relative to fee awards from the United States, for the authorization it required. Not finding it there (before EAJA), the Court denied the award:

> "If * * * one of the main functions of a private attorney general is to call public officials to account and to insist that they enforce the law, it would follow in such cases that attorney's fees should be awarded against the Government or the officials themselves." Alyeska at 267.

Local governments strongly object to paying the expenses of the litigation even if they caused it. But just as before 1853, Congress is free to transfer the burden of payment to them in such a case, even though the employee was not acting in accordance with the policy of the government. And besides, the American Rule at 162 provided for payment of "any excess of costs" by the party or attorney which caused them. Thus the costs might fall properly on the government whose prestige multiplied the obstacles which the successful private attorney general overcame.

But if there remains a residuum which will be uncompensated even though the expense was reasonable, I believe Congress did not discharge the debt it owed the prosecutor. The Constitution requires "just compensation". Congress cannot pay just a portion of what is "just". S. 1580 substantially violates this Constitutional imperative.

Moreover, in S.1580 DOJ attempts to invade the contractor-subcontractor relationship by ignoring the well-founded proposition that attorney fees awards go to the party and not to the party's attorney. See, e.g, Brown v General Motors Corp, 722 F2d 1009, 1012 (2d Cir 1983); Richard v Reed, 611 F2d 545, 546 (5 Cir 1980); Clark v Marsh, 609 F Supp 1028, 1030 (D.D.C. 1985). Thus the party, being the "private attorney general", should get the award regardless of its choice of attorney, or even if it litigated without employing another person for counsel. S.1580 instead requires the party to hire a licensed attorney to recover anything (Sec 3(1)); using an in-house, salaried attorney would prevent the award of overhead and "related expenses" (Sec 3(4)). But if the benefit was obtained by any means for Congress, simple Equity demands the benefited to pay the provider, for the labor to obtain the benefit without reference to the means to achieve it.

The equitable principle which DOJ intends to repeal with S. 1580 was expounded by the 3rd Circuit in Ex Parte Plitt, 2 Wall. Jr 453 (1853), shortly after the American Rule was enacted. Plitt was an award to Daniel Webster's executor because without Webster's legal assistance an inheritance would not have been distributed to American legatees, even though Webster's client received none of the distribution. Plitt ruled first that the principle survived the American Rule because it was grounded in Equity. The Supreme Court cited Plitt when it affirmed the principle, in Trustees v Greenough, 105 U.S. 527, 535 (1881), which today is known as the seminal "common fund" case. Equity would not deny an award to a party bestowing a benefit on another, regardless of whether the party performed the task personally or subcontracted the work. In making such a distinction, S. 1580 would bifurcate the equitable basis for such awards.

Furthermore, because the party acts as "attorney for the United States" Rule 68 must be applied carefully. In such a posture, the Attorney General does not represent the United States but only a person, suspected of committing an unlawful act. The United States by definition never acts unlawfully. Congress is the engine driving the acts of every person in government, and Congress may only communicate by enacting a law. I.N.S. v Chadha, 103 S. Ct 2764 (1983). Thus there is no way the United States can act except in accordance with a law. The United States is represented in the controversy by the private attorney general, and as such the United States will not be subject to Rule 68 unless a statute so prescribes. Art I Sec 9 Cl 7 blocks payment.

If Rule 68 is to continue to be the Congressional policy to force the parties to settle quickly, even in cases where the injuring party violated the oath to faithfully execute the law, then it would seem that Congress will want to make the policy applicable to instances where the injured party proposed to settle and the injuring party refused. Such case is not addressed in S. 1580.

My suggestion, to amend the jurisdictional laws to provide for notification and to provide time for response before suit, would if enacted form the foundation for imposing severe recompense if, after notification, a government agency decides to use its "brute force" to try evading the violator's duty to make the injured party whole again. Congress could use this notification and refusal as the trigger to impose a sum equal to the costs incurred after the refusal upon the employee which refused to settle. This sum would be in addition to the fee award ordinarily due for services as private attorney general. This additional sum would not fall on the taxpayers, please note.

Does the Present System Abuse Losing Parties?

Initially, we note that in every case where litigation expenses are authorized by Congress to prevailing private attorneys general, if the Attorney General had prosecuted the case under the companion Title 18 statute the "convicted" defendant would be under jeopardy of a heavy fine and a prison sentence. Moreover, the Attorney General would have had a very large expenditure for not only prosecuting the case and incarcerating **the guilty** parties, but also the cost of investigation beforehand. Such cost avoidance is not a trivial matter. In S. Hrng 99-202 at 346, using actual statistics compiled by DOD, the cost of the average successful investigation (i.e, suspect was convicted by preponderance of evidence) was about $200,333 including overhead but excluding litigation. If the Congressional policy gets private attorneys general to shoulder this work, this money will be available for other uses. Thus we should credit such funds, before we debit any costs payable by the United States to private attorneys general.

But attorneys should not be allowed to overcharge just because they make it possible to recover more than their services cost. Because the premise in S. 1580 is overcharging, its proponents bear the burden of proving how much a lawsuit "should cost". Then they must prove that the existing system for establishing the reasonability of fees is inadequate to prevent overcharge correction. Last, they must prove that S. 1580 does not merely shift the payment of the overcharge to someone else.

We begin by asking how much a lawsuit "should cost". Some lawyers advertise "divorce for $100". Surely no one will say that any fact-bound case should be costed with a fixed price. Moreover, litigation being an exercise of a creative mind, and minds being not fungible, there is no expectation that one attorney will arrive at the proper attack equally as quickly as all other attorneys. Finally, litigation time is of the essence. A party cannot send out "IFB's" to attorneys, wait for 60 days, open bids, negotiate pricing and assess compatibility, and then leisurely file a suit, if a contract will be unlawfully consummated by a government agent and will irreparably injure the party and the United States within hours. These diverse forces make it very difficult for anyone to say how much a lawsuit "should cost". They also destroy the idea that every lawsuit may be pursued at one established rate for the attorney's time.

An attorney's style has a decided effect upon judges. Arguments and tactics suitable for insurance litigation would be unthinkable to employ in, say, the Court of Appeals for the Federal Circuit. And the latter court is a far cry from other Courts of Appeals, in the manner of case presentation.

We must concede that litigation is an art, not a science, practiced by persons of diverging styles, in situations devoid of market-balancing factors. And just like in Bradshaw, those artists may thwart the delivery of justice by withholding their services if the party refuses to provide the compensation they demand.

Attorneys do not appear to set rates on a basis of "cost" but on a basis of "demand" or what they call "market". I dislike this approach as a buyer of a "scarce" and necessary service. But for Congress to dictate cost-control by statutory fiat will require the United States to be the dominant consumer of such services. Otherwise, attorneys will ply their trade with others instead. That is the "Gresham's Law" of the situation. So, we must see whether the United States is dominant.

Clearly, no statistics will prove dominance. Of all the lawsuits filed by parties in the United States, only a relative handful concern matters whereby there could be a fee award from a governmental agency. No group here claims otherwise. And, the Bradshaw case is representative of the fact that attorneys do boycott these types of cases.

Moreover, experience under EAJA has chilled those attorneys which tried to recover under its auspices. Almost unanimously, parties which have applied and secured an award were subjected to an even greater loss on balance than they would have incurred if they had never applied. That result is because of DOJ's vicious response to a fee award, and the reluctance of courts to temper or compensate for that opposition to award. For example, DOJ policy is to appeal every award. The cost of defending awards is almost never compensated, although such defense often costs three times the amount awarded. Surely this model on which S. 1580 was based is not what Congress would want applied to private attorneys general acting in the Congressional interest, and surely such a model will lead to a boycott by every sensible attorney.

Nonetheless, we may develop an interesting rule-of-thumb regarding how much of an attorney's time will be productive, relative to cases involving statutes wherein private attorneys general will be involved and cases involving routine criminal matters.

Under the Criminal Justice Act, appointed attorneys for indigents may earn up to $60 per hour. An attorney at full speed probably could not put in more than 2000 compensated hours per year engaged in such services. The rest of the year's time would be spent in continuing education, etc. The point is that because clients are "supplied" by the system, the time may be used to maximum efficiency to achieve a clearly-targeted income. Expenses may be closely budgeted as a result.

If the attorney is expected to act in response to economics, then every alternative to the above must be measured against that yardstick.

Private attorneys general do not receive referrals from the court system. Their cases are not nearly as uniform. Importantly, the body of laws and regulations is in constant turmoil. And when a case materializes, the attorney must spring into action immediately. Court files are littered with corpses of meritorious cases which failed because they were filed late or for other rigid technicalities for which there was no time for research.

Consequently, the time per year available for casework is much less for private attorneys general than for other specialists. Probably only some 1300 hours could be billable.

But there is a big difference between the practice of criminal and civil law. Attorneys are prohibited from contracting for contingent fees in criminal cases, but may do so in civil cases.

The case statistics on favorable decisions against governmental agencies show that only about 25% of plaintiffs "prevail". Thus if the fee will be collectible only for prevailing, then only 1300/4 = 325 hours per year will result in "gross income" for the private attorney general for the United States.

If private attorneys general act according to economic law, then they should charge the United States about 6.15 times the amount they would have charged under the Criminal Justice Act.

It is popular to think that "someone else" should pay for the cases or issues within a case that the attorney loses. After all, no value was obtained for the paying party. But as we have seen, there is no one else. The overhead must be paid or else the attorney will not take the next case. This is the hardest lesson of all to accept.

This multiplier accrues to the party, not the party's subcontractors. It is the party which Congress requires to prevail in order to be compensated. Thus the actual payment will be divided among the subcontractors as the party sees fit and not as Congress dictates, unless Congress declares its privity in subcontracts. Obviously though, a party which contracts to pay its subcontractor attorney on a regular, current basis win or lose will not (ethically) be charged for contingency of losing by the attorney. Such also will be the case if the attorney is an employee of the party. But the United States will still be liable in Equity if it insists on compensating the party for victories on its behalf but not for losses on its behalf, for the effective value of such "overhead".

But if the United States transfers the liability for payment to the loser, is it proper to insist that the loser rather than the United States should pay for the "overhead" caused by another party in another case, which defeated the private attorney general? While such may be legal, perhaps it would not be fair. This issue suggests that perhaps the awards laws presently are too simplistic to settle the propriety without further declaration by Congress.

Congress might limit the liability of all losing parties to the actual cost of delivery of services, plus a reasonable profit thereon to the party and any cost of delay caused by the loser. The United States would then be declared liable for an amount 5.15 times the amount for which the losing party is liable.

I believe this plan would be acceptable to the local governments and the others sued by the private attorney general. However, it would give the local governments the power to inflict heavy payments upon the United States by simply contesting strongly the case in chief. Thus it may be better to leave the entire assessment upon the losing party, which was of course the source of the injury.

Another cost-effective alternative is to simply order payment by the United States in every case brought by a private attorney general, in regular installments. This plan would drastically reduce the outlay, even though losing cases were included, because attorneys would no longer be insisting on premiums for handling the difficult litigations. This plan would also provide a much more effective deterrent against law violations by government agents. Fewer violations would mean fewer suits.

But given the present guidelines, the fee award statutes do not seem to be unfairly penalizing agents of government which injure parties by violating federal law. S. 1580 would provide nothing of interest to Congress regarding relief.

Should Congress Let DOJ Control Procedures

S. 1580 would give DOJ the exclusive control over procedures regulating private attorneys general. In effect, this would be like permitting the criminals to decide who would be eligible to prosecute them, and how the matter would be conducted. It is a very bad idea.

DOJ correctly implies that private attorneys general should be regulated by a published set of instructions. The problem is to identify how such may be accomplished, inasmuch as DOJ usually does not "represent" the United States position in cases involving private attorneys general. One might believe Congress could issue the regulations, but Congress after Chadha cannot do so.

The appropriate solution is for Congress to enact the rules in statutory form, approved by the President.

EAJA has demonstrated what happens when an antagonistic agency is permitted to specify the rules by which opposing attorneys general may get fee compensation. The agencies each wrote their own rules to accompany 5 U.S.C. §504. The rules have effectively choked off awards. The courts on the other hand, operating under Congressional "rules", have awarded to many more applicants than have the agencies.

S. 1580 is an example of what we may expect if DOJ were given the power to write the procedures. It is completely unbalanced, in favor of coddling convicted law violators which operated under color of law. It is reason enough to deny DOJ the power to set the rules for such actions.

Conclusion

The foregoing shows how foolhardy and counterproductive enactment of S. 1580 would be for Congress. It is obviously a bill by an adversary, which is constantly trying to get the upper hand on Congress.

Proper fee control requires a different approach. Presently, there is no evidence that new legislation is required to control costs. But once again I submit that the highest-priority amendments would be those listed in S. Hrng 98-288 at 146-47.

Instead of hampering victims of federal-law violators, Congress should intensify the effort to prevent the Attorney General from helping the violators escape justice. Let's have fewer interventions on the wrong side.

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November 18, 1985
STATEMENT OF J. H. McQUISTON
on S. 1794 & S. 1795

McQuiston Associates
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Mr Chairman and Members of the Committee:

McQuiston Associates is a "think tank" which for many years evaluated the advisability and constitutionality of bestowing absolute immunity upon selected government employees by Act of Congress. We believe that the issues connected with such immunity are substantial; liability for injury never evaporates, but sometimes may be assumed by a guarantor instead of the injurer. Such guarantor may in some cases be the agency employing the injurer.

I believe S. 1794 & S. 1795 deserve a "do not pass" recommendation. Both Bills are designed to permit adjudicators to perform unconstitutional acts without incurring any liability therefor. But the people granted Congress only limited power, and that power does not include granting immunity from the constitutional command for all officials to obey the Constitution. It goes without saying that a command without penalty for disobedience is a nullity.

Moreover, if Congress enacted legislation shifting liability from the official which acted unconstitutionally to the taxpayers which employed the malfeasant, then the authority of the charter by which the taxpayers organized their government would be jeopardized. These Bills would be a poor vehicle with which to begin such a momentous attack on local governments.

Spokesmen advocating such questionable Bills apparently fail to realize that in a Democracy no one must be free of liability for performance of an unconstitutional act. We will not tolerate unconstitutional acts of any government official, who of course has given an oath to abide by the constitution and laws of those which permitted the official to govern them. If the official believes the job is too difficult without acting unlawfully, the official should resign.

Nothing in the entire history of the United States, including the Supreme Court decision idiotically denigrated by the various Judges supporting these Bills, would jeopardize any adjudicator properly attending to official duties. There is no reason whatsoever for either Bill.

Liability legislation, from which adjudicators now seek immunity, was enacted in part precisely because these same adjudicators withheld the protections of federal law from those which Congress had commanded them to protect:

> "State courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights. * * * Subsequent interpretations of the Civil Rights Acts * * * acknowledge Congress' intent to reach unconstitutional actions by all state actors, including judges." Pulliam v Allen, 52 LW 4525 at 4530 (1984)

It wouldn't be appropriate for Congress now to permit them to resume the prior obstruction of federal law, which would surely occur if the Bills were enacted.

Furthermore, although the Bills purport to affect State judges, whatever Congress enacts regarding state employees the courts will apply by analogy to federal employees, absent a strong command and reasoning from Congress to the contrary:

> "it would be 'incogruous and confusing to say the least' to develop different standards of immunity for state officials sued under §1983 and federal officers sued on similar grounds under causes of action founded directly on the Constitution." Butz v Economou, 438 U.S. 478, 499 (1977), citing the 2nd Circuit.

The common law, as established by the *Judicial Branch*, now *shields* juries and judges-as-jury from liability arising out of their *discretionary* decisions, such as whether they *believe* one set of facts or a competing set. But *no* common-law rule shields a trier of fact from liability arising out of a failure to *obey* the *law* governing the trier. No one permits "vigilantism" under color of law:

> "Since an unconstitutional act, *even if authorized by statute*, was viewed as not authorized in contemplation of *law*, there could be no immunity defense. Indeed, there appears to have been some doubt as to whether *even an Act of Congress* would immunize federal officials from suits seeking damages for *constitutional* violations." *Butz* at 491 & n.15.

Accordingly, *Pulliam v Allen*, 104 S Ct 1970, 52 LW 4525 (1984), explained and *protected* the *discretionary* acts performed by factual adjudicators, while condemning and holding-liable judicial "vigilantism" committed by officials which know better. *Pulliam* is precisely the result Congress would codify if it enacted law.

Allen v Burke, 690 F2d 376 (4 Cir 1982), which *Pulliam* affirmed, sets forth a *horrendous* tale of totalitarian-style repression by a county magistrate, *many years after* the Supreme Court pronounced such repression to be *unconstitutional*. Pulliam's acts, which at the time were clearly-known to be unconstitutional *and* unlawful, are equatable to those of Argentinian judges which, not long ago, ordered thousands of *desaparecidos* to be incarcerated in a similarly *heinous* fashion:

> "Allen was arrested on a charge for which incarceration is *not authorized* under Virginia law (i.e, using abusive language). Pulliam *incarcerated* Allen until his trial *14 days* later, however, solely because he was not able to meet $250.00 bail (Pulliam *regularly* incarcerated persons charged "with misdemeanors * * even though such offenses are *not* punishable by incarceration). Allen was *not* advised of his *right to appointed* counsel or taken before a judge (Va Code §19.2-158 *requires* an accused who is incarcerated be brought before a trial judge)." *Allen v Burke*, 690 F2d at 377 & nn. 1-3.

The foolish adjudicators which support these Bills would have Congress let the Executive Branch *dominate* judges; released from *all* liability, judges would have no excuse to *follow* the law if the Executive wanted otherwise. Any judge resisting the Executive would be *replaced* by one which would eagerly comply.

Thus it is *strongly* to a judge's self-respect and protection that the movement to release the last vestige of *personal* liability should be *stopped*.

For, without *some* iota of liability for one's own acts, there is *no* deterrent to "vigilantism". Such a person with the Judicial power would be a magnet for corruption. The temptation for the Executive would be irresistible.

Presently, the common-law rules for restraining an adjudicator are very strict and permit very little interference. *Pulliam* remarked that even *that* case might have *turned out differently*, if the case-in-chief had been properly appealed. For instance, a party seeking injunctive relief must show the offensive act was not an exercise of judicial *discretion*, and that there was a substantial likelihood of *repetition* of the party's injury. See, e.g, *City of Los Angeles v Lyons*, 461 U.S. 95 (1983)(Injured party must adduce a "credible threat" of recurrent injury to merit injunctive relief); *Pulliam*, 52 LW at 4530 n.17 (Even irreparable injury is insufficient to enjoin a state-court proceeding unless the injury is "both great and immediate"). And injunctive relief is not permitted at all, if there is an *adequate remedy at law* (such as an appeal of the court's findings). See, e.g, *Pulliam* at 52 LW 4530 (requirement for inadequate remedy and serious risk of irreparable harm severely curtails risk judges will be compromised by disgruntled-party suit threat).

The probability of recovering costs against a judge, even after getting injunctive relief, is very low. See, e.g, Pulliam at n.19 (Courts are reluctant to impose costs against a judge). And be assured that a poorly-pleaded case, losing against a judge, will be assessed to repay the judge for the defense. See, e.g, Campana v Muir, 615 F Supp 871, 881 (M.D. Penn 1985) ($4,130.00 @ $100 per hr awarded to DOJ for copying out "hornbook" letter pleading judicial immunity in libel action); Ryan v Bilby, 764 F2d 1325, 1328 (9 Cir 1985) (Double costs & fees awarded DOJ for defending judge although case-law was unsettled before suit).

Besides Pulliam, only a few other plaintiffs have managed to recover fees against an adjudicator. They all were egregious cases:

1. Zarcone v Perry, 581 F2d 1039 (2 Cir 1978). A night traffic-court judge, disliking the coffee served by a catering-truck near the courthouse, ordered the sheriff to manacle the caterer and bring him into the crowded courthouse. There, the judge periodically threatened the caterer with legal action and loss of livelihood, during the lengthy session. The caterer as a result experienced a severe physiological reaction and became unable to work. Upon suit, the caterer recovered compensatory & punitive damages and attorney fees against the judge and sheriff.

2. Consumers Union v Supreme Court of Virginia, 688 F2d 218 (4 Cir 1982)(after 446 U.S. 719 (1980). Virginia Supreme Court prevented Consumers Union from gathering factual data about fees attorneys in Virginia charge customers for services. After the U.S. Supreme Court decided that the Virginia Court's acts are sometimes "legislative" or "executive" instead of "judicial", the federal courts calculated the Virginia Court's fee liability in the case, related to "enforcing"(executive) the "ban" (legislative) on "legal advertising" (disclosing what the lawyer would charge). The Virginia Court compounded the litigation expense by its costly and unsuccessful appeals and the follow-up adjudications.

3. Morrison v Ayoob, 627 F2d 669 (3 Cir 1980)(cert den 2nd time when Pulliam decision entered). A group of county magistrates decided, without authorization, to send indigents to jail without first affording them the right to counsel, even though in 1972 the Supreme Court outlawed such practice. After the Legal Services Assoc. applied for injunctive relief, the judges agreed to obey the law of the United States. But the judges multiplied the expense further by vigorously opposing the fee award.

In no case did any judge receive inequitable treatment regarding fee liability. For example, Butz described a similar and invariant history of equitable assessments upon officials violating their oaths to obey the Constitution. Common-law was deemed insufficient to shield violators from liability. And U.S. v Lee, 106 U.S. 196 (1882), rejected the Bills' theory that immunity from judgment is separable from the immunity from suit. Personal immunity excuses the person from the entire suit:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. * * * It cannot be, then, that when, * * * one of them has established his right to * * the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed." Lee at 221.

Such immunity as is allowable must be pleaded and granted at the outset:

> "In order to establish entitlement to absolute immunity a [government employee] must first show that the responsibilities of his office embraced a function

> "so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which the liability is asserted.
>
> "* * Even if they cannot establish that their official functions require absolute immunity, * * public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial.
>
> "* * [Q]ualified immunity would be defeated if an official 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff * * *'.
>
> "* * [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
>
> "* * [W]e provide no license to lawless conduct." Harlow v Fitzgerald, 457 U.S. 800 (1982).

Finally, courts recognize that the guarantor of personal immunity will be liable for litigation involving immune officials. E.g:

> "As an aid to the enforcement of 42 U.S.C. §1983, we hold that 42 U.S.C. §1988 authorized the assessment of attorney's fees against these defendants to be paid by the State of Illinois regardless of defendants' personal immunity [from damages]. Hutto v Finney, 437 U.S. 678." Lampher v Zagel, 755 F2d 99, 104 (7 Cir 1985).

See also Morrison v Ayoob at 672 (Judicial immunity no bar to fee award; award is against state per Hutto).

This brief look at the state-of-common-law indicates that S. 1794 & S. 1795 are unsuitable and unnecessary intrusions.

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The Firestorm over Attorney Fee Awards

By Robert A. Diamond

WHEN it was before Congress, it was attacked as "a bonanza to the legal profession" by Sen. James B. Allen, D-Ala., during a two-week filibuster.

It was the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, which permits a federal court, in its discretion, to award reasonable attorney's fees to a prevailing party (other than the federal government) who sues to enforce civil rights laws. Despite Allen's efforts, the act became law in 1976.

Although the statute has not proved to be a lawyers' full-employment bill, as the senator feared, it has touched off an explosion in civil rights cases. Within five years of its enactment, there was a 66 percent increase in the number of civil rights suits filed annually in the federal courts against state and local governments. The number of these lawsuits ballooned from 17,543 in 1976 to 29,173 in 1981, according to the Administrative Office of the U.S. Courts.

This proliferation of lawsuits has set afire two legal issues that are now pending before the U.S. Supreme Court.

One case is *Blum v. Stenson*, No. 81-1374, in which New York State is challenging a U.S. district court decision to award $119,000 in attorney's fees to the New York Legal Aid Society based on the market rate normally charged by attorneys of similar skill in the vicinity, plus a bonus award of 50 percent above the market rate.

The Civil Rights Attorney's Fees Award Act has exploded the number of civil rights cases and set afire two issues now pending before the U.S. Supreme Court.

The issue in the *Blum* case is how "reasonable" attorney's fees should be awarded under Section 1988. One study of fee awards in civil rights cases decided between 1974 and 1979 showed compensation rates varying by 685 percent. See 13 *John Marshall Law Review* 331 (1980). The U.S. Court of Appeals for the Second Circuit, for example, recently upheld Section 1988 awards to Wall Street's Cravath, Swain & Moore at the hourly rate of $60 in *McCann v. Coughlin*, 698 F. 2d 112 (2d Cir. 1983), and to the New York Legal Aid Society at rates exceeding $150 per hour in the *Blum* case.

The other case is *Pulliam v. Allen*, No. 82-1432, in which Virginia seeks reversal of a Fourth Circuit decision affirming an award of attorney's fees against a Culpeper County magistrate who had repeatedly jailed individuals charged with non-incarcerable offenses.

200 lawsuits

Judicial immunity traditionally has barred suits for damages against judges for acts performed in their judicial capacity. The issue in the *Pulliam* case is whether this immunity prohibits Section 1988 fee awards in lawsuits to enjoin civil rights violations by judges. According to Minnesota Attorney General Hubert H. Humphrey III, approximately 200 lawsuits have been brought against judges in the last three years alleging Section 1983 civil rights violations, with 14 cases now pending in which Section 1988 attorney's fees have been sought.

The Civil Rights Attorney's Fees Awards Act was passed in the aftermath of the Supreme Court's 1975 ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240. In this case the Court held that specific congressional authorization was required to award attorney's fees under any of the various federal civil rights laws. Before the *Alyeska* decision, many lower federal courts had ruled that fee awards were permissible under any of the civil rights laws because they had been authorized in several statutes enacted in the 1960s.

Section 1988 permits the award of attorney's fees in lawsuits brought to enforce four Civil War-era civil rights statutes enacted between 1861 and 1871, plus Title VI of the 1964 Civil Rights Act and Title IX of the 1972 Education Act.

The most important of the Civil War-era statutes to which Section 1988 applies is the Civil Rights Act of 1871, 42 U.S.C. § 1983, which guarantees the right to bring suit in federal court against states that deprive citizens of rights secured by the Constitution or law.

Financial headaches

The coupling of Sections 1988 and 1983 has spawned the dramatic increase in the civil rights caseload in the federal courts and has brought pounding financial headaches to state governments.

According to a survey conducted by the National Association of Attorneys General, there is a cumulative total of $778,090 in Section 1988 fee awards against Florida, $428,000 against Hawaii, $400,000 against Massachusetts, $400,000 against Washington and $270,000 against Ohio. These figures are typical of the experience of other states, according to the association.

Added to these dollar amounts are $4.78 billion in pending Section 1983 damage claims—not including attorney's fees—against 200 cities participating in a survey conducted by the National Institute of Municipal Law Officers.

"The purpose of the fees act was not to create a lucrative civil rights bar, but to enable poor persons to assert their constitutional rights by providing reasonable attorney's fees if they won their case," said Sen. Hatch, R-Utah, who has introduced legislation to limit the scope of Section 1983 and to reduce Section 1988 fee awards.

The controversy provoked by the cases before the Supreme Court pits, on

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Gladys Pulham: Does judicial immunity prohibit fee awards in lawsuits to enjoin civil rights violations by judges?

the one side, states and municipalities worried about the drain on their treasuries and on the other side, the non-profit and private civil rights bar concerned that civil rights cannot be enforced without fee awards that finance the litigation and discourage civil rights violations.

During its last term the Supreme Court held that a plaintiff may obtain fees only for legal work performed on the claims that prevailed. The case, *Hensley v. Eckerhart*, 103 S.Ct. 1933, was decided May 16 and marked the first analysis by the Court of the factors to be used in determining "reasonable fees" under Section 1988. The lower courts had awarded attorney's fees to the St. Louis Legal Aid Society for all legal work performed for persons confined in a Missouri state hospital, although the plaintiffs won on only five of their six claims.

Hubert H. Humphrey III: Approximately 200 lawsuits have been brought against judges in the last three years.

Justice Powell, joined by Chief Justice Burger and Justices White, Rehnquist and O'Connor, focused on the "results obtained" by the plaintiffs and remanded the case. They concluded that "a reduced fee award . . . is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." Justice Brennan dissented, stating that the remand was an "invitation to losing defendants to engage in . . . appeals from awards of attorney's fees . . . which greatly increase the costs to plaintiffs of vindicating their rights. . . ."

Bonus-awarded firms

Blum arose after certain medicaid recipients represented by legal aid won a lawsuit challenging the state's policy of terminating medicaid benefits. The U.S. District Court for the Southern District of New York awarded attorney's fees to the Legal Aid Society based on hourly rates ranging from $95 to $105 for the three attorneys assigned to the case, for an award of $79,000 plus a 50 percent bonus award of more than $39,000. With the bonus, the hourly rate for the three attorneys ranged from $142.50 to $157.50. *Stenson v. Blum*, 512 F. Supp. 680 (1981).

In determining the fee, the court first multiplied the number of hours worked by "the hourly rate normally charged for similar work by attorneys of like skill in the area" to obtain a "lodestar" figure. Next it awarded a 50 percent bonus based on prior bonus awards in the federal court to reflect factors such as the "complexity" and "risk" of the litigation, the "benefit to a large class of needy people" and the "quality of representation." The Second Circuit affirmed in an unpublished memorandum opinion, No. 81-7385 (Oct. 19, 1981).

New York Attorney General Robert Abrams argued in the state's petition for certiorari that the bonus "is not authorized. . .by Section 1988. . .. [is] a 'windfall,' unnecessary to attract competent counsel, and [is] grossly unfair to the defendants who in most cases will be paying the award out of public funds."

Attorney General Kenneth O. Eikenberry of Washington, joined in an amicus brief by 22 other state attorneys general, argued that "the legal aid counsel were doing exactly what they were employed to do, and what they would have done had the case arisen. . .prior to the enactment of Section 1988."

"No lion of the New York bar was needed, nor amici suspect, did. . .[the plaintiffs] feel any need to seek one out," he said. He disputed the "risk" rationale as applied to non-profit firms that "stood to lose nothing" because they are not fee-generating offices.

Abrams argued that applying the market rate standard to non-profit legal organizations is inappropriate because they practice in an area of the law almost exclusively occupied by similar non-billing organizations. He proposed a "more reliable cost-plus reasonable profit" standard or a "fixed hourly ceiling." The "cost-plus" standard could, Abrams argued, be readily applied based on financial records that non-profit and private firms are required to maintain.

Legal aid's argument

In its reply, legal aid argues there was no congressional intent in enacting Section 1988 to single out public interest law firms for "special treatment." Quoting from the Senate report on Section 1988, it states, "Fees under the Act are to be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases, and fees should not be reduced because the rights involved are non-pecuniary in nature." On the bonus issue, legal aid said that in three cases cited by the Senate report as examples of the correct application of a Section

Kenneth O. Eikenberry: Legal aid counsel were doing exactly what they were employed to do.

1988 standard, hourly fees were adjusted upward to reflect risk and the quality of representation.

John E. Kirklin, director of litigation for the New York Legal Aid Society, said in an interview that while the market rates in *Stenson* are "relatively high, our position is that the legislative history and intent supports our position that there should be no distinction between fees for profit and non-profit firms." It is "disingenuous," he said, "to say that the *Stenson* fees based on New York City rates would be applied nationally. There is a built-in protection because the true market rate will be the market value for legal services in the community."

"No one is getting rich from this kind of litigation," Kirklin said. "The money does not go to the individual attorneys, but to the organizations, and helps prevent layoffs. And, of course, you don't get paid unless you win." He added, "It is true that there is no risk in a monetary sense; but these cases take a long time and take our resources away from other cases we also have a mandate to handle—for example, landlord-tenant and domestic relations."

Norman Chachkin, deputy director of the Washington Lawyers' Committee for Civil Rights under Law, said, "We see no evidence to suggest that private attorneys are lining up to take civil rights cases; the fees do not compensate for the time spent and the relitigation of the case on a request for attorney's fees."

The "break-point" approach

A recent Second Circuit case, *New York State Association for Retarded Children v. Carey*, has adopted a new "break-point" approach to setting Section 1988 fee awards for non-profit firms. In that case the court reduced by more than half a $1.4 million attorney's fee award obtained by the Legal Aid Society and the New York Civil Liberties Union for 10 years of legal work. No. 82-7531, June 15, 1983, reversing 544 F.Supp. 330 (E.D.N.Y. 1982).

The *Carey* panel, which included none of the judges who participated in the summary affirmance of *Stenson*, termed the $1.4 million award, including a "lodestar" and a bonus, a "substantial windfall" because it compensated the two non-profit firms at a higher rate than it cost them to support their attorneys on an hourly basis. The court cut back the award to what it termed a "break point" that awarded fees "to non-profit law offices at billing rates of *comparable attorneys in the general run of cases* as long as the billing rates are not so high that their use risks significant windfalls." (Emphasis added.)

The court then ruled that the "break point" was $75 per hour for work done in 1978-80 and $50 for pre-1978 work. The court also cut a 25 percent bonus award by the district court to 10 percent to reflect that a reward was not necessary to induce the Legal Aid Society and the New York Civil Liberties Union to take the case. Legal aid and the union have petitioned for a rehearing en banc.

Judicial immunity

Justice Powell, dissenting in *Stump v. Sparkman*, 435 U.S. 349 (1978), said that "underlying . . . [judicial] immunity . . . is the notion that private rights can be sacrificed in some degree to the achievement of the greater public good deriving from a completely independent judiciary, because there exist alternative forums and methods for vindicating those rights."

This notion will be examined in the *Pulliam* case, which arose when Richmond B. Allen, an unemployed laborer, was arrested in Culpeper County, Va., in January 1980 and was charged with a breach of the peace for cursing and using abusive language, a misdemeanor for which the maximum penalty is a fine. Jailed by Magistrate Gladys Pulliam when he was unable to post bond, he spent 14 days in pre-trial detention without appointment of counsel. He was then tried, found guilty and released.

In January 1981 he retained Deborah C. Wyatt, a Charlottesville criminal law and civil rights attorney, and brought suit under Section 1983 against Pulliam in federal district court seeking declaratory and injunctive relief against her practice of committing to pre-trial incarceration persons unable to post bond for non-incarcerable offenses. Jesse W. Nicholson, an elderly alcoholic, intervened as a plaintiff in May 1981. Arrested four times in Culpeper County for being drunk in public, a non-incarcerable misdemeanor, he was committed on each occasion to pre-trial detention by Pulliam because he was unable to post bond.

Deborah C. Wyatt: She is seeking relief for those whose civil rights have been violated.

The district court, finding that Pulliam had jailed at least 34 persons for non-incarcerable offenses when they were unable to post bond, granted the plaintiffs' motion for summary judgment, declaring that the magistrate's practice violated the plaintiffs' due process and equal protection rights. The court enjoined continuation of the practice and granted the plaintiffs' request for $7,691 in attorney's fees and costs. The Fourth Circuit affirmed, Judge Sam J. Ervin III ruling that "judicial officers are not immune from an award of attorney fees in an action in which prospective [declaratory or injunctive] relief is properly awarded. . . ." *Allen v. Burke*, 690 F. 2d 376 (4th Cir. 1982).

Scope of the Immunity

In Virginia's brief to the Supreme Court, Attorney General Gerald L. Baliles argues that the doctrine of judicial immunity, held by the Court many times to bar a suit for damages against a judge, also prohibits actions for prospective relief. He contends alternatively that even if judicial immunity does not bar prospective relief, it bars an award of attorney's fees.

Conceding that the Supreme Court has applied the doctrine of judicial immunity only to actions for damages against judicial officers acting in their judicial capacity, Baliles argues that the broad language of the court in the leading judicial immunity cases "makes no distinction between types of relief sought in civil actions. . . . The principle is equally applicable to deny civil actions seeking equitable relief," he wrote. The "chilling effect" of possible imprisonment and fines for contempt, he contends, is "at least as pernicious as the threat of a money judgment . . . [and] the label attached to the payment of money is inconsequential."

Wyatt, joined on the brief by John Calvin Jeffries Jr. of the University of Virginia, stresses that the state is requesting an "extension" of the doctrine to cover prospective relief. They note that in *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980), the Court upheld the liability of the Supreme Court of Virginia in its "enforcement" capacity as the agency that conducts disciplinary proceedings against lawyers. The Court stated that it had never ruled on whether judicial immunity bars prospective relief against judges acting in their judicial capacity. In *Consumers Union* the Court noted that the Second, Fourth and Seventh circuits have ruled that judicial immunity does not extend to prospective relief and that the Eighth, Ninth and District of Columbia circuits "appear to agree."

Two Supreme Court justices already may have signaled how they will vote in the *Pulliam* case. When *Consumers Union* went back to the district court, the award of attorney's fees against the Supreme Court of Virginia was reinstated, 505 F.Supp. 822 (E.D. Va. 1981), and the Fourth Circuit affirmed, 688 F.2d 218 (1982). On June 20 the Court denied certiorari (103 S.Ct. 3124), but Chief Justice Burger, joined by Justice Rehnquist, dissented from that action with an opinion. Noting the principle of judicial immunity, the chief justice wrote: "I fail to see how an award of attorney's fees is any less of a threat to judicial independence than an award of damages. . . . I would not presume that Congress cast this fundamental rule [of judicial immunity] to the winds in the absence of specific statutory language rendering judges liable for attorney's fees. No such language is found in Section 1988."

Amicus briefs

Amicus briefs supporting the state have been filed by the American Bar Association, Minnesota on behalf of 48 states, the Conference of Chief Justices, the Pennsylvania court administrator and the chief judge of the New York Court of Appeals.

Gerald L. Baliles: Doctrine of judicial immunity prohibits actions for prospective relief.

The ABA brief focuses on the threat to the judiciary of attorney's fees awards but does not contend that judicial immunity bars prospective relief against a judge. "It does not follow," stated the brief, "from the fact that judicial conduct may be enjoined in some circumstances that judges also may be required to pay damages or attorney fees. The former remedy no more affects judicial independence than does the possibility of reversal, but a monetary sanction would strike at the heart of neutral and detached decision making." Signing the ABA brief are Morris Harrell, as president of the Association; W. Ervin James Sr. of Houston; James J. Richards of Hammond, Ind.; and Phillip J. Roth and Kelly Hagen of Portland, Ore.

In the brief filed by the 48 amici states, Attorney General Humphrey said the fact that many states have indemnification statutes covering public officials did not reduce the "intimidating effect" of a fee award against the independence of judges. Forcing judges to go "hat in hand" to the state for indemnification, he argued, "would be profoundly disturbing to all conscientious jurists."

Alternative forums

Addressing what may be the key issue in *Pulliam*, the Conference of Chief Justices contends that the doctrine of immunity need not be compromised because there exist other "alternative forums" to vindicate individual rights without the necessity for prospective relief against state judicial officers.

The conference's brief, prepared by Paul L. Friedman and Michael D. Sullivan of White & Case, Washington, D.C., argues that Allen could have appealed the magistrate's bail determination through the Virginia court system or could have petitioned for state habeas corpus relief. After exhausting state review procedures, he could have sought federal habeas corpus. Had he done so, they contend, he would have been granted relief prior to the state trial.

Wyatt and Jeffries counter that these procedures would not have helped Allen or Nicholson, who during their pre-trial detention were "appointed no counsel, advised of no rights, [and] given no appearance" before any judge. "The inability to correct the violations of their constitutional rights through normal appellate review," they argue, "must be of primary importance in this Court's decision on the issue of immunity from prospective relief."

They cited the Court's language in footnote 11 of *Gerstein v. Pugh*, 420 U.S. 103 (1975): "Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted."

In an interview, Wyatt said "the main virtue of prospective relief in a situation like this is that it prevents the repetition of the violation of constitutional rights. The practice has stopped in Culpeper County because Allen, after his release, sought counsel to help other people who would be subjected to the practice. Without this relief, Nicholson, a man with a history of arrests in connection with alcoholism, would have been repeatedly incarcerated because he could not come up with bail."

"There will be," she added, "constitutional violations which prompted the civil rights acts that cannot be addressed meaningfully without prospective relief against judicial officers."

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Surveying the Law of Fee Awards Under the Attorney's Fees Awards Act of 1976

Federal courts have traditionally refrained from awarding attorney's fees to prevailing litigants absent a specific statutory authorization or a case falling into one of three well recognized exceptions.[1] In 1975, the Supreme Court reaffirmed this so called "American Rule"[2] in *Alyeska Pipeline Co. v. Wilderness Society*.[3] Specifically, the *Alyeska* Court reversed a trend in lower federal courts to create a fourth exception to the "American Rule," namely, the "private attorney general" exception.[4] Under this exception, courts reasoned that plaintiffs who had successfully prosecuted civil rights violations had advanced a public interest by vindicating congressional policy, and had thereby earned an award of attorney's fees. In *Alyeska*, the Supreme Court rejected this judicially created exception to the "American Rule" as invading the legislature's province.[5]

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[1] 421 U.S. 240, 257 (1975). The first of these three exceptions to the American Rule is the "bad faith" exception wherein courts award attorney's fees to a party whose opponent has proceeded in bad faith, vexatiously, or for oppressive reasons. *See, e.g.*, Vaughan v. Atkinson, 369 U.S. 527 (1962); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963). The second exception, usually labelled the "common fund doctrine," allows the payment of attorney's fees out of a common fund created by the litigation for the benefit of others. *See, e.g.*, Mills v. Electric Autolite Co., 396 U.S. 375 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939). The third exception permits the plaintiff to recover attorney's fees from a recalcitrant defendant who disobeys a court order in a civil contempt proceeding. In such a case, the amount is viewed as a penalty on the defendant for disobeying a court order. *See, e.g.*, Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923).

[2] Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). The rationale behind the "American Rule" is that parties should not be penalized for merely defending or prosecuting a lawsuit. Routinely awarding attorney's fees in litigation would unjustly discourage the poor from instituting actions to vindicate their rights, if the penalty for losing included the fees of their opponent's counsel. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

[3] 421 U.S. 240 (1975).

[4] *See, e.g.*, Cornist v. Richland Parish School Bd., 495 F.2d 189 (5th Cir. 1974); Fowler v. Schawrzwalder, 498 F.2d 143 (8th Cir. 1974); Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974); Morales v. Haines, 486 F.2d 880 (7th Cir. 1974); Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974). In Wilderness Soc'y v. Morton, the court explained that the private attorney general exception encouraged plaintiffs to pursue civil rights litigation despite the great expense and well-financed defendants involved, thereby enforcing such legislation. *Id.* at 1032.

[5] 421 U.S. at 271.

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Academic commentators almost unanimously condemned the *Alyeska* decision, warning that it effectively stifled the private enforcement of civil rights.[6] In response to *Alyeska*, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976.[7] This act amended section 1988 to allow district courts, in their discretion, to award reasonable attorney's fees to parties, other than the United States, who prevail in suits brought to enforce their civil rights under certain civil rights statutes.[8] According to the legislative history, Congress intended the Act to "remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska* . . . and to achieve consistency in our civil rights laws."[9] The Senate Judiciary Committee, which reported favorably on the bill, recognized that the congressional policies contained in civil rights laws depend heavily on enforcement by private citizens.[10] The committee noted that since many private citizens are without sufficient funds to finance a lawsuit, especially where merely prospective relief is sought, to preclude the award of fees effectively frustrates the purpose of civil rights laws.[11] The committee appropriately quoted Judge Clark from *Hall v. Cole*:[12] "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose."[13] In sum, the Act's goal is to encourage private enforcement of civil rights legislation by citizens who could not otherwise afford it.

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[6] *See, e.g.*, Special Project, *Recent Developments in Attorney's Fees*, 29 VAND. L. REV. 685, 719 (1976); Comment, *Alyeska Pipeline Turns Off the Tap: Can Public Interest Law Survive*, 72 NW. U.L. REV. 239, 247 (1976); Comment, *After Alyeska: Will Public Interest Litigation Survive?*, 16 SANTA CLARA L. REV. 267, 288 (1976).

[7] 42 U.S.C. § 1988 (1976). For a description of the Act's progress through Congress, see Malson, *In Response to Alyeska—The Civil Rights Attorney's Fees Awards Act of 1976*, 21 ST. LOUIS U.L.J. 430 (1977).

[8] Section 1988 provides in pertinent part:

> In any action or proceeding to enforce a provisión of sections 1981, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1976) ("section 1988" or the "Act"). The sections to which § 1988 applies (§§ 1981-1986) are commonly referred to as the Reconstruction-era Civil Rights Acts. Section 1981 requires equality in civil rights, 42 U.S.C. § 1981 (Supp. V 1981). Section 1982 guarantees all persons within the United States jurisdiction equality in property rights. *Id.* § 1982. Section 1983, the section plaintiffs most frequently rely upon, prohibits anyone from depriving any United States citizen or person within the United States jurisdiction of any right, privilege, or immunity granted by the Constitution under color of state law. *Id.* § 1983. Section 1985 prohibits conspiracies to interfere with another's civil rights. *Id.* § 1985. Section 1986 provides a penalty for those who are aware of conspiracies that violate § 1985 but fail to act to prevent the interference although they have the power to do so. *Id.* § 1986

[9] S. REP. NO. 94-1011, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908-09. The gaps and inconsistencies to which the Senate Report refers arise because other civil rights legislation has expressly provided for the award of attorney's fees. *See, e.g.*, Emergency School Aid Act of 1972, § 718, 20 U.S.C. § 1617 (1976) (repealed in 1978); Voting Rights Act Amendments of 1975, § 402, 42 U.S.C. § 2973(c) (1976); Civil Rights Act of 1964, § 204(b), 42 U.S.C. § 2000a-3(b) (1976); *Id.* § 706(k), 42 U.S.C. § 2000e-5(k); Fair Housing Act of 1968, § 812(c), 42 U.S.C. § 3612(c) (1976).

[10] S. REP. NO. 94-1011, *supra* note 9, at 2, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5910.

Statistics indicate that the goal of opening the federal judiciary's doors to all civil rights plaintiffs has been fulfilled. Within five years of its enactment, the number of civil rights cases brought against state and local governments under 42 U.S.C. § 1983 increased by two-thirds.[14] Accompanying this increase was a concurrent rise in the number of cases involving proper application of the Act. This note surveys, through court decisions, the current state of the law relating to the Act and analyzes the decisions in light of the Act's legislative history and purpose. Parts I and II of this note discuss, respectively, who may recover, and who may be liable for, attorney's fees under the Act. Part III discusses whether attorney's fees are available when the litigation terminates without court ordered relief, and part IV discusses the calculation of a reasonable fee.

I. Who May Recover Under the Act

Section 1988 provides that a "prevailing party"[15] may recover attorney's fees from his opponent. Despite the straightforward language, this term has prompted much litigation. This section of the note discusses the standards applied by courts in determining whether a party has "prevailed" within the meaning of the Act.

A. *The Prevailing Plaintiff*

Congress patterned the section 1988 language after that in Titles II[16] and VII[17] of the Civil Rights Act of 1964. The Act's legislative history indicates that Congress intended the standards for awarding

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[11] *Id.* at 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5910-11.

[12] 462 F.2d 777 (2d Cir. 1972).

[13] S. Rep. No. 94-1011, *supra* note 9, at 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5910 (quoting Hall v. Cole, 462 F.2d at 780-81.)

[14] Diamond, *The Firestorm Over Attorney Fee Awards*, 69 A.B.A. J. 1420 (1983). According to the Administrative Office of the U.S. Courts, the number of lawsuits filed against state and local governments rose from 17,543 in 1976 to 29,173 in 1981. *Id.* at 1420.

[15] *See* note 8 *supra*.

[16] Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1976), prohibits discrimination in places of public accommodation. Section 2000a-3(b) covers attorney's fees:

> 1. In any action pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as

fees under the Act, including the meaning of "prevailing," to be generally the same as that under the Civil Rights Act of 1964.[18] In fact, the Senate Report on the Act cited with approval[19] the Supreme Court's interpretation, in *Newman v. Piggie Park Enterprises, Inc.*,[20] of the term "prevailing" in the Civil Rights Act of 1964. In *Newman*, the Court of Appeals for the Fourth Circuit had held that the plaintiffs, who had won injunctive relief under Title II of the 1964 Civil Rights Act, were not entitled to a fee award unless they could show that the defendants had proceeded in bad faith or for the purpose of delay.[21] The Supreme Court disagreed and held that a "successful" plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render it unjust."[22]

Although this interpretation of "prevailing" supports the policy of encouraging private litigation, the term "successful" is no less ambiguous than "prevailing." One court has subsequently defined "successful" to mean "succeed[ing] on any significant issue in litiga-

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> part of the costs, and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000a-3(b) (1976).

[17] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), prohibits discriminatory employment practices. Section 2000e-5(k) covers attorney's fees:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k) (1976).

The most notable distinction regarding attorney's fees between Titles II and VII of the Civil Rights Act of 1964 and § 1988 is that in Titles II and VII Congress included express language imposing liability on the United States equal to that of a private person. Courts later found the omission of such language in § 1988 critical and exempted the United States from liability under the Act. *See, e.g.*, Shannon v. United States Dep't of Housing & Urban Dev., 577 F.2d 854, 860 (3d Cir. 1978). However, by adopting the Equal Access to Justice Act, 28 U.S.C. § 2412 (Supp. V 1981), in October, 1981, Congress expressly waived the federal government's immunity from assessments of attorney's fees where other parties would be similarly liable. *See* text accompanying notes 66-73 *infra*.

[18] S. Rep. No. 94-1011, *supra* note 9, at 4, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5911.

[19] *Id.* at 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5913.

[20] 390 U.S. 400 (1968).

[21] Newman v. Piggie Park Enters., 377 F.2d 433, 437 (4th Cir. 1967).

[22] 390 U.S. at 402. In *Newman*, the Court noted that if plaintiffs were required to bear their own attorney's fees, "few aggrieved parties would be in a position to advance the public interest." *Id.* Five years later, in Northcross v. Board of Educ., 412 U.S. 427 (1973) (per curiam), the Supreme Court applied the same reasoning and standard to a fee shifting provision under the Emergency School Aid Act of 1972, 20 U.S.C. §§ 1601-1619 (1976) (repealed in 1978). Section 1617 of that act contained a similar fees award clause. The Supreme Court standard has been commonly referred to as the *Newman-Northcross* standard.

tion which achieves some of the benefit the parties sought."[23] Other courts have emphasized that the successful plaintiff-applicant need not show the defendant proceeded in bad faith or frivolously,[24] that the nature of his conduct was intentional or wanton,[25] or that the plaintiff is himself unable to pay the fees.[26] Were these determinations relevant, a plaintiff might prevail on the merits but still have to pay his attorney's fees. Faced with this possibility, many plaintiffs, even those with meritorious claims, might forego litigation.[27] Likewise, an attorney might be hesitant to take civil rights cases if unable to assess his chances of a fee award. Therefore, by eliminating these conditions for awarding section 1988 attorney's fees to prevailing parties, courts have further encouraged private enforcement of civil rights laws.

In contrast to the liberal interpretation of section 1988 reflected above, some courts have denied prevailing parties fee awards where

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[23] Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). In *Nadeau*, the plaintiffs, inmates at the New Hampshire State Prison, filed a § 1983 suit seeking access to library facilities and improved confinement conditions. Prior to completing the trial, the parties entered into, and the district court subsequently approved, a consent decree which considerably improved the conditions the plaintiff class had been subjected to prior to the institution of the suit. *Id.* at 277. The district court, however, refused to award attorney's fees because the plaintiffs had not succeeded in obtaining formal relief. The First Circuit remanded the case stating that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Id.* at 278-79.

[24] *See, e.g.*, Christianburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978); Newman v. Piggie Park Enters., 390 U.S. 400, 401 (1967); Olitskey v. O'Malley, 597 F.2d 303, 305 (1st Cir. 1979); Hughes v. Repko, 578 F.2d 483, 489 (3d Cir. 1978).

[25] *See, e.g.*, Brown v. Culpepper, 559 F.2d 274, 278 (5th Cir. 1977); Gates v. Collier, 559 F.2d 241, 242 (5th Cir. 1977); Johnson v. Combs, 471 F.2d 84, 86 (5th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d 348, 359-60 (5th Cir. 1972); Miller v. Amusement Enters., 426 F.2d 534, 538 (5th Cir. 1970).

[26] *See, e.g.*, Cooper v. Singer, 719 F.2d 1496, 1500 (10th Cir. 1983); Sargeant v. Sharp, 579 F.2d 645, 649 (1st Cir. 1982); Gore v. Turner, 563 F.2d 159, 164 (5th Cir. 1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 66 F.R.D. 483, 492 (W.D.N.C. 1975); Gunther v. Iowa State Men's Reformatory, 466 F. Supp. 367, 369 (N.D. Iowa 1969); *cf.* Zarcone v. Perry, 581 F.2d 1039 (2d Cir. 1978). The *Zarcone* court is credited with establishing the "bright prospects" rule: a plaintiff whose case possesses the potential for a large damage award and who can therefore secure private counsel through a contingency arrangement, cannot utilize the Act because he does not need it to attract competent counsel. *Id.* at 1044. However, other courts have questioned the *Zarcone* opinion because it ignores the deterrent effect fee awards can have on defendants. *See, e.g.*, Cooper v. Singer, 719 F.2d 1496, 1503 (10th Cir. 1983); Sanchez v. Schwartz, 688 F.2d 503, 505 (7th Cir. 1982).

[27] Of course, every plaintiff assumes the risk of not prevailing on the merits. This is a risk that an experienced lawyer should be able to reasonably quantify for the potential litigant before proceeding to trial. However, unlike the risk of losing the substantive claim, counsel cannot reliably predict the chance of recovering fees because of such additional factors as the plaintiff's good faith at trial.

"special circumstances" exist. They have asserted two bases for this authority: 1) the judicial discretion granted in assessing fees by the Act[28] and 2) the Supreme Court's *Newman* opinion requiring that a prevailing party receive attorney's fees unless special circumstances would render it unjust.[29] For instance, courts have denied prevailing plaintiffs attorney's fees where the complaint was in reality a tort action cloaked in a constitutional due process claim,[30] where the public was not benefitted by the litigation,[31] where only nominal damages were awarded,[32] and in other situations.[33]

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[28] *See* note 8 *supra*. ("[T]he court, *in its discretion*, may allow the prevailing party . . . a reasonable attorney's fee.") (emphasis added).

[29] *See* note 22 *supra* and accompanying text.

[30] Martin v. Hancock, 466 F. Supp. 454, 456 (D.C. Minn. 1983) (case was no more than a common law negligence dog-bite case clothed as a constitutional claim under 42 U.S.C. § 1983); Zarcone v. Perry, 438 F. Supp. 788, 790 (E.D.N.Y. 1977) (tort action for false imprisonment and false arrest couched in a constitutional due process claim). Justice Rehnquist warned in dissent in Butz v. Economou, 438 U.S. 478, 522 (1978) that "[t]here are a large number of claims that can be converted by a legal neophyte into a claim of denial of procedural due process." *Cf.* Milne v. Cavuato, 653 F.2d 80, 83 (2d Cir. 1981) (award of attorney's fees proper where plaintiff prevailed on wholly statutory, non-civil rights claim pendent to a substantial state claim); Konczak v. Tyrell, 603 F.2d 13, 19 (7th Cir. 1979), (award of attorney's fees proper even if only a private wrong is righted), *cert. denied*, 444 U.S. 1016 (1980); Kow v. New York City Housing Auth., 539 F. Supp. 708, 709 (S.D.N.Y. 1982) (rejecting defendant's contention that fee award was inappropriate since case provided only a private benefit, but allowed only one-half of the award requested).

[31] *See, e.g.*, Perez v. University of P.R., 600 F.2d 1, 2 (1st Cir. 1979); Buxton v. Patel, 595 F.2d 1181, 1185 (9th Cir. 1979); Martin v. Hancock, 466 F. Supp. 454, 456 (E.D.N.Y. 1977); Zarcone v. Perry, 438 F. Supp. 788, 791 (E.D.N.Y. 1977). For instance, in *Zarcone*, the plaintiff, a coffee vendor, was handcuffed and brought into night traffic court so that the presiding judge could criticize the quality of the coffee he sold. Zarcone subsequently succeeded in recovering compensatory and punitive damages in excess of $140,000. *Id.* at 789. The district court, however, refused to award attorney's fees under § 1988 because the suit was basically one for damages for false imprisonment and benefitted the public only in a general sense. *Id.* at 790. Rather than precluding an award, other courts view the lack of public benefit as reason for reducing the amount of the award. *See, e.g.*, Oliver v. Kalamazoo Bd. of Educ., 576 F.2d 714 (6th Cir. 1978); Beazer v. New York City Transit Auth., 558 F.2d 97 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 568 (1979); Foster v. Gloucester County Bd., 465 F. Supp. 923 (D.N.J. 1978); Naprstek v. City of Norwich, 433 F. Supp. 1369 (N.D.N.Y. 1977).

It seems anomalous for courts to provide § 1983 relief to a plaintiff whose individual civil rights are violated but to award fees only where the litigation impacts favorably on the public in the district court's view. All successful civil rights suits benefit the public in that the particular defendant and others will be deterred from such conduct in the future.

[32] Huntley v. Community School Bd., 579 F.2d 738, 742 (1978) ($100 nominal damages award deemed a "moral victory" insufficient to warrant an award of attorney's fees). Other courts view the award of nominal damages as relevant in determining the amount of the fee's award, but not its availability. *See* Skoda v. Fontani, 646 F.2d 1193 (7th Cir. 1981); Perez v. University of P.R., 600 F.2d 1, 2 (1st Cir. 1979); Rhueark v. Shaw, 477 F. Supp. 897 (N.D. Tex. 1979).

[33] *See* Buxton v. Patel, 595 F.2d 1181, 1184 (9th Cir. 1979) (plaintiff's chance of success sufficiently high to attract competent counsel); Zarcone v. Perry, 581 F.2d 1039 (1978); Pharr

Some commentators have forcefully argued that granting courts the discretion to deny fee awards in undefined, "special circumstances" has ultimately frustrated the Act's purpose.[34] The lack of objective criteria upon which an attorney can assess his chance of an award under the Act eventually discourages private enforcement. Therefore, courts should use their discretion only to determine the amount of the fee award and not its availability.

B. *The Prevailing Defendant*

The Act's legislative history indicates that prevailing defendants may also recover attorney's fees.[35] However, in contrast to the liberal *Newman-Northcross* standard applicable to prevailing plaintiffs,[36] the Supreme Court stated in *Christianburg Garment Co. v. EEOC*,[37] that defendants may only recover a fee award where the "action was frivolous, unreasonable or without foundation."[38] The court noted that this high standard appropriately favors prevailing plaintiffs over prevailing defendants for two reasons: 1) the plaintiff is the "chosen instrument"[39] to advance congressional policy; and 2) when a plaintiff

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v. Housing Auth., 704 F.2d 1216 (11th Cir. 1983) (fee award limited by terms of contingent fee arrangement in a § 1983 action); White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 454 (1982) (court might deny fee awards where the post-judgment motion unfairly surprises or prejudices the defendant); Oliver v. Kalamazoo Bd. of Educ., 576 F.2d 714, 718 (6th Cir. 1978) (the attorney's fee award would have been paid by the school treasury—the same funds used to educate the beneficiaries of the desegregation order).

[34] Berger, *Court Awarded Attorney's Fees: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 283-94 (1977); *see also* Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346, 377 (1980); Comment, *Calculation of a Reasonable Award of Attorney's Fees Under the Attorney's Fees Awards Act of 1976*, 13 J. Mar. L. Rev. 331, 398-99 (1980).

[35] *See* H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976); S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5912.

[36] *See* note 22 *supra* and text accompanying notes 18-23 *supra*.

[37] 434 U.S. 412 (1978).

[38] *Id.* at 421. The court also noted that when a plaintiff acts in bad faith, the court needs no statutory authority to award attorney's fees given the common-law exception recognized in Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975). *See* note 1 *supra*; *cf.* text accompanying note 44 *infra*; Harris v. Group Health Ass'n Inc., 662 F.2d 869 (D.C. Cir. 1981); Copeland v. Martinez, 603 F.2d 981 (D.C. Cir. 1979); EEOC v. First Ala. Bank, 595 F.2d 1050 (5th Cir. 1979); Richardson v. Hotel Corp., 468 F.2d 951 (5th Cir. 1971); Moss v. ITT Continental Banking Co., 468 F. Supp. 420 (E.D. Va. 1979); Reed v. Sisters of Charity, 447 F. Supp. 309 (N.D. La. 1978); Goff v. Texas Instruments Inc., 429 F. Supp. 973 (N.D. Tex. 1977). While courts generally will not look at the defendant's ability to pay when the plaintiff prevails, they will do so where the prevailing defendant seeks attorney's fees from the plaintiff under the *Christianburg* standard. *See, e.g.*, Hughes v. Rowe, 449 U.S. 5 (1980); Lee v. Chesapeake & O. Ry., 389 F. Supp. 84 (D. Md. 1975); Carrion v. Yeshiva Univ., 297 F. Supp. 852 (S.D.N.Y. 1975).

[39] *Christianburg*, 434 U.S. at 418-19.

prevails, the fee award is against a defendant who has violated federal laws, but when a defendant prevails, this is not true.[40] A more persuasive reason for this double standard, as recognized in the Senate Judiciary Report,[41] is that if made responsible for their opponent's attorney's fees when unsuccessful, plaintiffs might be deterred from prosecuting valid claims, thereby frustrating the Act's purpose.[42]

As previously mentioned, an established exception to the "American rule" which forbids federal courts from awarding attorney's fees is where one party has proceeded in bad faith or vexatiously.[43] A court, therefore, could arguably award attorney's fees to a defendant against a vexatious plaintiff without a specific statutory authorization. However, there is apparently a fine distinction between this common law exception and the *Christianburg* "bad faith" exception. In *Goff v. Texas Instruments Co.*,[44] the federal district court concluded that since section 1988 includes a separate standard for defendants, it requires a more liberal application than the traditional common law bad faith test.[45] While the court's interpretation is reasonable, the judges must proceed with caution in applying section 1988 to prevailing defendants since they risk deterring potential plaintiffs and their counsel.

C. *Attorneys Who May Recover*

Section 1988 indicates that the plaintiff, and not his attorney, is technically entitled to the fee award.[46] While the client may be the real party in interest,[47] the practical benefit inures entirely to the attorney. Therefore, which attorneys are eligible becomes an appropriate consideration.

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[40] *Id.* at 419.

[41]
> [P]rivate attorneys general should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious or brought for harassment purposes.

S. REP. NO. 94-1011, *supra* note 9, at 5, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5912.

[42] *Accord* Heinsz, *Attorney's Fees for Prevailing Title VII Defendants: Toward a Workable Standard*, 8 U. TOL. L. REV. 259 (1977); Note, *Attorney's Fees—Recovery by Prevailing Defendants in Title VII Actions*, 13 WAKE FOREST L. REV. 627 (1977).

[43] *See* note 1 *supra*.

[44] 429 F. Supp. 973 (N.D. Tex. 1977).

[45] *Id.* at 975.

[46] *See* note 8 *supra*.

[47] *See* Richards v. Reed, 611 F.2d 545, 546 (5th Cir. 1980) ("It was proper for client to be made real party in interest in proceeding to recover attorney's fees, . . . since recovery would go to client in the first instance, though lawyer would ultimately benefit."); *see also* Proctor v. Gissendaner, 579 F.2d 876, 880 (5th Cir. 1975).

The Act undoubtedly applies where a party is represented by a private attorney.[48] However, courts have also found organizational attorneys and members of legal aid societies entitled to a fee equivalent to that which would have been awarded to a party represented by a private attorney.[49] Recently, the Supreme Court reaffirmed this position in *Blum v. Stenson*.[50] In this case, the Court concluded that Congress intended fee awards to be based on "prevailing market rates in the relevant community, . . . regardless of whether the prevailing party is represented by private profit-making attorneys or nonprofit legal aid organizations."[51] Whether the client is obliged to pay less than the normal fee, or no fee at all is therefore irrelevant to whether, and to what extent, a court awards attorney's fees.[52] Of course, courts premise such holdings on the assumption that any award will be turned over to the organization, and not retained by the client or the responsible attorney.[53]

The Act's legislative history provides no authority for treating a legal aid attorney differently than a private attorney. According to the Senate Judiciary Committee report, "[f]ees under the Act are to be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases."[54] Therefore, under section 1988, courts should award organizational attorney's fees equal to that charged by private firms within the community. Theoretically, fee awards permit such public organizations, often understaffed and underfunded, to finance additional litigation in the civil rights area.

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[48] In this context, "private attorney" means an attorney procured by a private individual to handle his lawsuit for a fee—not a salaried attorney who works for an institution.

[49] *See* Palmigiano v. Garrahay, 616 F.2d 598 (1st Cir. 1980); Lund v. Affleck, 587 F. 2d 75 (1st Cir. 1978); Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Becker v. Blum, 487 F. Supp. 873 (S.D.N.Y. 1980); *cf.* Page v. Preisser, 468 F. Supp. 399 (S.D. Iowa 1979)(award of attorney's fees to Legal Services Corporation of Iowa should be based, in part, on attorney's salary and other ascertainable overhead expenses); and from the same court, Alsager v. District Court, 447 F. Supp. 572 (S.D. Iowa 1977)(fees paid to plaintiff's American Civil Liberties Union based on attorney's annual salary and time expended on case). *See generally* Note, *Awards of Attorney's Fees to Legal Aid Offices*, 87 HARV. L. REV. 411 (1973).

[50] 52 U.S.L.W. 4377 (U.S. Mar. 20, 1984).

[51] *Id.* at 4379. The defendant in *Blum* argued that the fee award should be based on the costs incurred by the legal aid organization. *Id.* The court rejected this proposition as flatly contrary to the Act's legislative history. *Id.*

[52] Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436. U.S. 913 (1978); Hairston v. R. & R. Apartments, 510 F.2d 1090 (7th Cir. 1975); Incarcerated Men v. Fair, 507 F.2d 281 (6th Cir. 1974).

[53] *See* Oldham v. Ehrlich, 617 F.2d 163, 168 n.10 (8th Cir. 1980)(awarding fees to Legal Aid Society of Omaha-Council Bluffs, Inc., which will go not to the individual attorneys, but to their organization employer); Hairston v. R. & R. Apartments, 510 F.2d 1090, 1093 (1975); Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974); Miller v. Amusement Enters., 426 F.2d 534, 539 (5th Cir. 1970).

[54] S. REP. NO. 94-1011, *supra* note 9, at 6, *reprinted in* 1976 U.S. CODE CONG. & AD.

Opponents of fee awards to organizational attorneys argue that the awards are not necessary to attract competent counsel in civil rights cases because these attorneys are paid by their employer to handle the case. Opponents also argue that the fee awards come out of the public sector, which in part funds the organization's operations.[55] However, these arguments ignore the Act's main goal: promoting private civil rights enforcement. Awarding fees to a prevailing public organization will permit it to hire additional attorneys, service more clients, and generally further the Act's goal.[56]

Finally, courts have also awarded fees to court appointed attorneys[57] and attorneys working pro bono.[58] Once again, these awards promote private enforcement of civil rights laws by encouraging other attorneys to accept such cases in the future.

II. Who May be Liable

Ordinarily, an individual defendant becomes liable for attorney's fees if unsuccessful in defending against the substantive claim. However, the question of who can be liable for a fee award is complicated when the defendants, often government entities or their officers under 42 U.S.C. section 1983, claim immunity from such an award.

NEWS at 5913. Despite this congressional intent, members of public interest law firms frequently complain that fee awards under the civil rights laws are unreasonably low as compared to awards in private antitrust actions under the Clayton Act. Berger, *supra* note 34, at 292-93. *See generally* COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 321 (1976).

[55] *See* Blum v. Stenson, 52 U.S.L.W. 4377, 4379 (U.S. Mar. 20, 1984); Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980); Leeds v. Watson, 630 F.2d 675, 677 (9th Cir. 1980); Palmigiano v. Garrahay, 616 F.2d 598, 600 (1st Cir. 1980); Hairston v. R. & R. Apartments, 510 F.2d 1090, 1092 (7th Cir. 1975); Brandenberger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974); *cf.* New York State Ass'n v. Carey, 711 F.2d 1136 (2d Cir. 1983) (court adopted a new "break-point" approach to setting § 1988 fee awards for non-profit firms, finding $75 per hour to be the point at which the organization is adequately compensated without receiving a windfall).

[56] The opponent's argument also erroneously implies that the fee award will go to the individual attorney when in actuality, it goes to his employer. *See* cases cited in note 53 *supra*.

[57] *See* Miller v. Carson, 563 F.2d 741, 756 (5th Cir. 1977); Drew v. Brierton, 443 F. Supp. 389 (N.D. Ill. 1978).

[58] McMurray v. Phelps, 533 F. Supp. 742, 770 (W.D. La. 1982); Letelier v. Republic of Chile, 502 F. Supp. 259, 267-68 (D.D.C. 1980); Selzer v. Berkowitz, 477 F. Supp. 686, 689 (E.D.N.Y. 1979).

This section of the note discusses the Act's applicability where the defendants are the United States, state or local governments, or their administrative or judicial officers.

A. *The United States*

Prior to October, 1981, prevailing parties could not recover attorney's fees under section 1988 from the United States.[59] The courts so holding relied on 28 U.S.C. section 2412,[60] wherein Congress prohibited attorney's fees awards against the United States absent an express statutory waiver of immunity. For example, in *Shannon v. United States Department of Housing and Urban Development*,[61] the Court of Appeals for the Third Circuit noted both the prohibition in section 2412 and the lack of an express provision in section 1988 for fee awards against the United States.[62] The court noted that other federal civil rights statutes, such as Title II of the Civil Rights Act of 1964, contain a fee provision.[63]

Since one purpose of section 1988 was to achieve consistency in the civil rights laws,[64] why Congress allowed courts to award fees against the United States under Title II but not under section 1988 is unclear. At least one court has suggested that it was mere oversight.[65]

Whatever the reason, on October 1, 1981, Congress promulgated the Equal Access to Justice Act ("EAJA").[66] The EAJA amended 28 U.S.C. section 2412 to permit courts to charge the United States with "[attorney's] fees and expenses to the same extent that any other party would be liable . . . under the terms of any statutes which specifically provides for such award."[67] The House Judiciary Committee, which reported favorably on the amendment, recognized that certain individuals were deterred from seeking review of, or defending against, unreasonable government intrusion because of the disparity in resources available to the parties.[68] The Committee further noted that this disparity was also a significant factor because of the proliferation of the federal bureacracy and governmental regulation.[69]

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[59] *See, e.g.*, Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd., 643 F.2d 1034, 1038 (5th Cir. 1981); NAACP v. Civiletti, 609 F.2d 514, 517-18 (D.C. Cir. 1980); Polos v. United States, 621 F.2d 385, 394 (Ct. Cl. 1980); Shannon v. United States Dep't of Housing & Urban Dev., 577 F.2d 854, 855-56 (3d Cir. 1978).

[60] Prior to amendment in October, 1981, § 2412 provided:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action.

28 U.S.C. § 2412 (1976).

[61] 577 F.2d 854, 855-56 (3d Cir. 1978).

[62] *Id.* at 855-56; *see, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(a)(4)(e) (1982) ("The court may assess against the United States reasonable attorney fees."); *see also* note 17 *supra*.

[63] 577 F.2d at 855-56. "The United States shall be liable for costs the same as a private person." Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1976).

[64] S. REP. NO. 94-1011, *supra* note 9, at 1, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5909; *see* text accompanying note 9 *supra*.

[65] Shannon v. United States Dep't of Housing & Urban Dev., 433 F. Supp. 249, 251 (E.D. Pa. 1977).

[66] 28 U.S.C. § 2412 (Supp. V 1981).

Recently, in *Premachandra v. Mitts*,[70] the Court of Appeals for the Eighth Circuit became the first court to consider the relationship between the EAJA and section 1988. In that case, a Veteran's Administration research scientist sought and received reinstatement to his job after claiming that his termination violated his fifth amendment procedural due process rights.[71] Although the case was settled out of court, the district court determined that the plaintiff was a prevailing party[72] and relying on section 1988 and the EAJA amended section 2412, awarded attorney's fees. On appeal the Eighth Circuit affirmed. Referring extensively to the legislative history of the EAJA, the court of appeals noted Congress' intent to "place the federal government and civil litigants on completely equal footing"[73] and to "clarif[y] the liability of the United States under such statutes as the

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[67] 28 U.S.C. § 2412(b) (Supp. V 1981). The section provides:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the cost which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her professional capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Id.

[68] H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 6 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4984.

[69] *Id.* at 8, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 4988.

[70] Premachandra v. Mitts, No. 82-2441, slip op. (10th Cir. Feb. 9, 1984).

[71] *Id.* at 2.

[72] *Id.* at 5. The court used the *Nadeau* two prong test to so decide. *See* text accompanying notes 100-01 *infra*.

[73] *Id.* at 19, 20 (citing H.R. Rep. No. 96-1418, *supra* note 68, at 8, 9, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 4987).

Civil Rights Attorney's Fees Awards Act of 1976."[74] The court concluded that the EAJA required the imposition of attorney's fees on a federal agency where, had a state or state official committed the same acts or omissions, it would be liable under section 1988.[75]

By adopting the EAJA, Congress corrected the anomaly which permitted the federal government to insulate itself from its own civil rights laws. Congress has now submitted the federal government to the same penalties levied upon state governments who violate civil rights laws.

B. *State and Local Governments*

In *Hutto v. Finney*,[76] the Supreme Court rejected the position that the eleventh amendment provides state and local governments immunity to section 1988 assessments of attorney's fees.[77] The Court first relied upon legislative history to show that Congress intended liability for attorney's fees under section 1988 to extend to the states. The Senate Judiciary Report on section 1988 stated: "[I]t is intended that the attorney's fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the state and local government . . . ."[78] Likewise, the corresponding House Report stated: "The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities."[79] The Court also noted that Congress had rejected two recent attempts to amend section 1988 to provide for state governmental immunity.[80]

Although the eleventh amendment normally bans retroactive relief against the states, the Court found the fee award in *Hutto* constitutional. The Court noted that in *Fitzpatrick v. Bitzer*,[81] it had held that the eleventh amendment's bar to retroactive relief was limited by the fourteenth amendment's enforcement clause.[82] Since section 1988 applies to laws arising under the enforcement clause, the Court found section 1988 a valid exercise of congressional authority.[83]

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[74] *Id.* at 22 (citing H.R. Rep. No. 96-1418, *supra* note 68, at 9, 17, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 4987, 4996).

[75] *Id.* at 19.

[76] 437 U.S. 678 (1978).

[77] The eleventh amendment reads:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subject of any foreign state.

U.S. Const. amend. XI.

[78] S. Rep. No. 94-1011, *supra* note 9, at 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5913.

[79] H.R. Rep. No. 94-1558, *supra* note 35, at 7.

[80] 437 U.S. 678, 694 (1978); *see* 122 Cong. Rec. 31,832-35 (1976) (amendment of Sen. Helms); *id.* at 32,296, 32,396-97 (amendment of Sen. Allen).

[81] 427 U.S. 445 (1976).

C. *Government Officials*

When a court finds a state or local government official liable in his official capacity, the employing governmental unit is responsible for any fee award.[84] However, when the government official is found liable as a private individual, two policy considerations collide. On one hand, to encourage private enforcement of civil rights, all defendants should be held to the same standard of conduct, thereby achieving consistent application of the Act. On the other hand, public officials, fearing personal liability for their acts, might not zealously and properly discharge their duties. In *Hutto*, the Supreme Court resolved this conflict in favor of the latter consideration and held that section 1988 does not apply where the governmental official is liable as a private individual.[85] In such cases, the prevailing plaintiff may recover fees from the individual official only by showing the official's bad faith.[86]

D. *Judicial Officers*

Judges who violate section 1983 present a particularly troublesome problem of immunity. The problem arises more frequently than one might think; in the last three years over two hundred lawsuits have alleged section 1983 violations against judges.[87] Until abrogated by statute, judges and prosecutors enjoy absolute immunity from liability for money damages.[88] The House Judiciary Committee, in its report on section 1988, said that because of this judicial immunity from money damages, "awarding counsel fees to prevailing plaintiffs . . . [as costs] is particularly important and necessary if federal civil and constitutional rights are to be adequately protected."[89]

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[82] 427 U.S. at 453. The fourteenth amendment provides in relevant part:

> Section 1 . . . No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .
>
> Section 5 . . . The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

[83] 427 U.S. at 455-56. *See generally* Note, *Attorney's Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875 (1975).

[84] *See* text accompanying note 78 *supra*.

[85] 437 U.S. at 699 n.32.

[86] *Id.*

[87] Diamond, *supra* note 14.

[88] Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967). In

The federal courts of appeals appear divided on whether judicial immunity extends to declaratory and prospective relief, as distinct from retroactive money damages.[90] However, in *Allen v. Burke*, the Court of Appeals for the Fourth Circuit, a circuit where judicial immunity does not bar injunctive relief against judges,[91] held that a court may charge attorney's fees to state court judges under section 1988 where injunctive relief is properly granted.[92] In so holding, the Fourth Circuit relied upon *Supreme Court v. Consumer's Union*.[93] In *Consumer's Union*, the Supreme Court sustained a district court's levy of attorney's fees under section 1988 against the justices of the Virginia Supreme Court in their "enforcement capacity."[94] The Court distinguished between the justices' "enforcement capacity" in regulating the Virginia bar and their "judicial capacity" and found that actions in the former capacity were not entitled to judicial immunity.[95] In summary, while the extent to which judicial immunity bars prospective relief remains an open question, those circuits which allow injunctive relief against judicial officers may also permit the concurrent

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Pierson, the Court implied that Congress has the power to abolish judicial immunity: "[W]e presume that Congress would have specifically so provided had it wished to abolish the [judicial immunity] doctrine." 386 U.S. at 554-55.

[89] H.R. REP. NO. 94-1558, *supra* note 35, at 7.

[90] The Second, Fourth, and Seventh Circuits do not extend judicial immunity to bar prospective relief. Heimbach v. Village of Lyons, 597 F.2d 344, 347 (2d Cir. 1979); Fowler v. Alexander, 478 F.2d 694, 696 (4th Cir. 1973); Hansen v. Algrim, 520 F.2d 768, 769 (7th Cir. 1975). The Eighth and Ninth Circuits appear to agree. Kelsey v. Fitzgerald, 574 F.2d 443, 444 (8th Cir. 1978) (only damage portion of suit against judge properly dismissed because of judicial immunity); Shipp v. Todd, 568 F.2d 133, 134 (9th Cir. 1978) ("quasi-judicial" immunity enjoyed by the clerk of the state court did not extend to suits for injunctive relief).

[91] *See* note 90 *supra*.

[92] 690 F.2d 376, 379 (4th Cir. 1982), *cert. granted*, 104 S. Ct. 29 (1983).

[93] 446 U.S. 719 (1980).

[94] *Id*. at 736. In Virginia, the Supreme Court has sole authority to regulate and discipline its attorneys. Pursuant to this authority, the Virginia Supreme Court promulgated and enforced the Virginia Code of Professional Responsibility, wherein Rule 2-102(A)(6) strictly prohibited lawyer advertising and inclusion in legal directories except under well-defined circumstances. In *Consumer's Union*, the plaintiff sought to publish a legal directory and filed suit contending that the Code's prohibitions violated the first and fourteenth amendments. *Id*. at 726. The district court, relying on Bates v. State Bar, 433 U.S. 350 (1977), declared Rule 2-102(A)(6) unconstitutional and permanently enjoined the Virginia Supreme Court from enforcing it. *Id*. at 721-27.

[95] *Id*. at 736.

award of attorney's fees as costs.[96]

III. Formal Relief Unnecessary

Section 1988 permits district courts to award attorney's fees to the prevailing party in any "action or proceeding"[97] to enforce the civil rights laws enumerated in the statute. Whether the Act applies in those situations where the parties settle the litigation before judgment is unclear, given this language.

When the parties settle the case by consent decree, the policies behind the Act suggest that a fee award is proper. Not only has the plaintiff secured compliance with congressional directives, but judicial economy has also been served by lessening the court's docket. In *Maher v. Gange*,[98] the Supreme Court held that the applicant whose section 1983 suit terminated in a favorable consent decree, was as entitled to a fee award as an applicant who had obtained formal relief at trial.[99] Clearly, the party securing the favorable consent decree is the "prevailing" party.

However, when the parties have settled outside of court, it is sometimes difficult to determine if the applicant for a fee award is the "prevailing" party. In *Nadeau v. Helgemoe*,[100] the Court of Appeals for the First Circuit announced a two prong test for determining whether a plaintiff who settled out of court was entitled to an attorney's fee award. The court held that a party was entitled to an award if: 1) the plaintiff's action was a necessary and important factor in achieving the defendant's concessions; and 2) the relief sought was required by law.[101] In evaluating the second prong of the *Nadeau* test, a court, however, must consider the merits of the case. This unnecessary adjudication could eventually consume whatever court time the pretrial settlement saved. Also, requiring the plaintiff to prove that he would have succeeded at trial discourages settlements.

This concern about discouraging settlements led the District Court of Maryland in *Unemployed Workers Organizing Commission v. Batterton*,[102] to dispense with the second prong of the *Nadeau* test. The court said the focus should instead be on whether the plaintiff obtained the relief sought, regardless of whether he would have prevailed at trial.[103] The *Batterton* holding is subject to criticism, however, for removing any incentive for the defendant to settle. Under *Batterton*, a defendant who settles out of court would be automatically liable for attorney's fees but, should the case go to trial, the defendant's liability for fees would be contingent upon the plaintiff successfully proving the defendant liable on the merits. In order to solve this problem, courts that anticipate a subsequent petition for attorney's fees should refuse to approve a settlement that does not contain fee provisions.

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[96] *See* Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497, 507 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); Morrison v. Ayoob, 627 F.2d 699, 672 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

[97] *See* note 8 *supra*.

[98] 448 U.S. 122 (1980).

[99] *Id*. at 130.

[100] 581 F.2d 275 (1st Cir. 1978).

[101] *Id*. at 280-81.

[102] 477 F. Supp. 509 (D. Md. 1979).

Finally, the most troublesome situation with regard to fee awards occurs when a defendant's voluntary act renders the case moot. In these situations, the parties do not execute a settlement agreement and therefore obviously cannot negotiate a fee agreement. If the plaintiff subsequently applies for attorney's fees, the court must assess the impact of the plaintiff's suit on the defendant's conduct. The critical issue is whether the plaintiff catalyzed the defendant's corrective actions, or if the defendant did so voluntarily. Although no court has yet addressed the problem, the *Nadeau* test utilized in settlement cases is also applicable where the defendant's remedial actions render the case moot. If the court finds that the plaintiff's suit was a substantial impetus for the defendant's corrective action, and that the relief sought would have been required by a court, then he should be entitled to a fee award as a prevailing party.

IV. Calculating a Reasonable Fee

Once a party has established that he is entitled to a fee award, the court must calculate the proper amount. This determination is crucial to promoting the Act's purpose. The size of these fee awards will directly affect the private bar's willingness to litigate such suits. The award must not be a windfall to the attorney,[104] yet it must be competitive with that which the attorney would have earned had he spent his time in other work. Given the frequency with which fee awards are litigated and their potential impact upon the bar's willingness to accept civil rights cases, courts should employ a systematic and consistent approach to calculating fees. The courts currently do not use a consistent approach: a study of civil rights cases from 1974-

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[103] *Id.* at 512-13.

[104] S. Rep. No. 94-1011, *supra* note 9, at 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5913.

1979 indicated that compensation rates varied by as much as 685 percent.[105]

One reason for this wide variance is the minimal guidance on fee calculation found in the Act's legislative history.[106] Another is the failure of many courts to articulate their fee calculation method—an undisclosed method obviously cannot be followed by other courts.[107] One exception to this, however, is the oft-cited case of *Johnson v. Georgia Highway Express, Inc.*,[108] where the Court of Appeals for the Fifth Circuit announced twelve criteria for trial courts to consider in determining a proper fee award. In *Johnson*, the trial court had awarded attorney's fees without explaining how they arrived at the particular amount.[109] On appeal, the Fifth Circuit noted that effective appellate review is impossible unless district courts record their reasons for arriving at a certain amount.[110] In remanding the case, the Fifth Circuit instructed the district court to consider the following twelve criteria in calculating the fee amount:

1) the time and labor expended by counsel;
2) the novelty and difficulty of the case;
3) the particular attorney's skill;
4) any preclusive effect this case might have had on counsel's ability to take other cases;
5) the attorney's customary fee;
6) the contingent nature of the litigation;
7) any unusual time limitations imposed by the litigant;
8) the amount of money involved in the case, or relief sought;
9) the experience, ability and reputation of counsel;
10) any undesirability in being associated with the cause;
11) the length of relationship between attorney and client;
12) awards in similar cases.[111]

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[105] Comment, *supra* note 34, at 378.

[106] The legislative history merely referred to Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) (discussed in text accompanying notes 108-11 *infra*), and cited cases where courts properly applied the *Johnson* criteria. *See* S. REP. NO. 94-1011, *supra* note 9, at 6, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5913.

[107] One commentator surveyed the district court opinions in volumes 384-94 of the Federal Supplement (1974-75). Of the 28 reported cases involving a fee determination, 13 cases contained "absolutely no articulated reason for the amount [of attorneys' fees] awarded." *See* Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977).

[108] 488 F.2d 714 (5th Cir. 1974). For cases citing *Johnson*, see note 112 *infra*.

[109] 488 F.2d at 715.

[110] *Id.* at 717.

[111] *Id.* at 717-19. The 12 criteria are analogous to those enumerated in the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (1979), for calculating attorney's fees with one exception: criterion number 10—the undesirability of being associated with the case. Ethically, the undesirability of a case should not impact upon the lawyer's billing rate, but as the Fifth Circuit apparently realized, in reality it does. *See also* MODEL RULES OF PROFES-

Other courts quickly accepted the *Johnson* criteria.[112] Indeed, even the Senate Judiciary Committee Report on section 1988 cited the *Johnson* case with approval.[113]

The *Johnson* criteria, however useful, have not substantially reduced the confusion regarding calculation of fee amounts. Commentators have criticized the list because the court did not state which factors, if any, should be weighed more heavily,[114] because some criteria appear redundant,[115] and because other criteria contradict the legislative history of section 1988.[116] Among the courts that claim adherance to the factors, many have applied them quite differently.[117] Still other courts, the Second Circuit in particular, altogether reject the criteria due to their inherent complexity and subjectivity.[118] The end result is that private attorneys cannot confi-

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SIONAL CONDUCT Rule 1.5 (1983) (listing eight relevant criteria in determining a reasonable fee which subsume the *Johnson* criteria except for criterion number 10—undesirability of the case).

[112] Courts cited the *Johnson* factors with approval in the following § 1988 cases: Hampton v. Hanrahan, 600 F.2d 600, 643 (7th Cir. 1979); Brown v. Bathke, 588 F.2d 634, 638 (8th Cir. 1979); Francia v. White, 594 F.2d 782, 788 (10th Cir. 1979); Fountila v. Carter, 571 F.2d 487, 496 (9th Cir. 1978); Rainey v. Jackson State College, 551 F.2d 672, 676 (5th Cir. 1977). The *Johnson* criteria have also been used by courts applying other fee shifting statutes. *See* Comment, *supra* note, 34 at 345 n.52.

[113] S. REP. NO. 94-1011, *supra* note 9, at 6, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5913.

[114] Berger, *supra* note 34, at 286-87; Note, *supra* note 34, at 372-73.

[115] For instance, the "time and labor required" is subsumed in assessing the "novelty and difficulty" of the question presented. Also, the "attorney's skill" is subsumed in assessing the attorney's "experience, ability and reputation of counsel."

[116] For instance, the "length of relationship between attorney and client" conflicts with the Act's purpose of assisting those who cannot afford attorneys, those who would not have an existing relationship with counsel. Also, the "amount of money involved in the case" conflicts with Congress' directive that fees should be awarded without regard to the pecuniary or nonpecuniary nature of relief sought. S. REP. NO. 94-1011, *supra* note 9, at 6, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5913.

[117] For instance, *compare* Kiser v. Huge, 517 F.2d 1237, 1254 (D.C. Cir. 1974) *with* Doherty v. Wilson, 356 F. Supp. 35, 41 (M.D. Ga. 1973) (both applying criterion number 8, relief sought; the first case discounted the fee award because of the little public benefit outside of the class members whereas, in the second case, the court found that consideration irrelevant); *compare* Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 117 (3d Cir. 1976) *with* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974) (both applying criterion number 6, contingent nature of case; the first case limited the fee award by the contingent fee contract, and the second case provided for enhancement of the fee award because of its contingent nature).

[118] *See* Detroit v. Grinell Corp., 495 F.2d 448, 470 (2d Cir. 1974) ("[T]his conceptual amalgam is so extensive and ponderous that it is probably not employed in any precise way by courts espousing adherence to it."); *see also* Merola v. Atlantic Richfield Co., 515 F.2d 165 (3d Cir. 1975).

dently evaluate their chances of receiving an adequate reward and are ultimately discouraged from participating in civil rights cases.

Recently, in *Hensley v. Eckerhart*,[119] the Supreme Court handed down its first opinion regarding the proper method of calculating fee awards.[120] In this case, involuntarily confined patients at a Missouri state hospital filed a section 1983 action alleging numerous statutory violations in the conditions at the hospital.[121] The district court found constitutional violations in five of six general areas of treatment.[122] The trial judge awarded $133,332.25 in section 1988 attorney's fees, and included in fee calculations the hours spent by the plaintiff's attorneys on the unsuccessful claims.[123] The Court of Appeals for the Eighth Circuit affirmed.[124]

In remanding the case for recomputation of the fees, the Supreme Court directed the district court to consider the extent of the plaintiff's success in calculating the proper fee amount.[125] The Court explained that the district court should initially determine the fee by multiplying hours reasonably expended by the prevailing hourly rate.[126] According to the Court, "hours reasonably expended" are those necessarily spent in achieving the results obtained.[127]

However, in some situations, calculating the hours expended may be more difficult than in others. The Court noted that where the plaintiff presents distinct, unrelated claims of civil rights deprivation, his attorney's time, if properly recorded, can easily be allocated to the various claims pursued. The district court should then assess a fee based only on hours spent on the plaintiff's successful claims. Any time spent on claims that were unsuccessful, however, should not be compensated, just as they would not be if spent on a separate, unsuccessful lawsuit.[128] The Court noted that, in other situations, the plaintiff's claims are not distinct, but rather simply rely on alternative legal theories or a series of incidents to support a single claim of civil rights deprivation. The Court said the plaintiff is entitled in such a case to a fee award for all hours expended, if the relief sought was achieved.[129]

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[119] 103 S. Ct. 1933 (1983).

[120] The Court has, however, considered the availability of an award in several cases: Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); Northcross v. Memphis Bd. of Educ., 416 U.S. 696 (1974); Newman v. Piggie Park Enters., 390 U.S. 400 (1968).

[121] 103 S. Ct. at 1936.

[122] *Id.* The district court found that the constitutional rights of involuntarily committed patients were violated in the following areas: physical environment; individual treatment plants; least restrictive environment; visitation, telephone, and mail privileges; and seclusion and restraint. 475 F. Supp. 908, 919-20 (W.D. Mo. 1979).

[123] 103 S. Ct. at 1937.

[124] 664 F.2d 294 (8th Cir. 1981).

[125] 103 S. Ct. at 1940.

[126] *Id.* at 1937.

[127] The Court explained:

> Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.

Id. at 1940.

When the district court determines the "hours reasonably expended," multiplying this number by the "prevailing hourly rate" yields an initial amount. The district court may then adjust this amount upward or downward at its discretion.[130] However, the Supreme Court emphasized that the "results obtained" should be the primary consideration in making further discretionary adjustments, although it would permit consideration of the other *Johnson* criteria.[131]

No fee calculation method will yield complete consistency in determining award amounts, just as the jury system never yields consistent compensatory damage awards to similarly situated plaintiffs. However, the Supreme Court's fee calculation guidelines will improve the consistency of section 1988 fee awards. By emphasizing the considerations of "relief obtained" and "hours reasonably expended," the Court has established a starting point for fee calculations. Still, the *Hensley* decision might be criticized for overemphasizing the "results obtained" factor in discretionary adjustments to the initial fee amount. District courts must therefore remain mindful of the congressional intent that the amount of the fee award not be reduced because the relief sought is nonpecuniary.[132]

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[128] Again, the Court explained:

> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved.

Id.

[129] In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Id. at 1940-41.

[130] The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the results obtained.

Id. at 1940.

[131] *Id.*

V. Conclusion

This note has presented a summary of the law of fee awards under the Attorney's Fees Awards Act of 1976. The Act's purpose, as emphasized above, is to encourage private enforcement of civil rights by aggrieved parties who otherwise could not afford competent counsel. In order for section 1988 to be effective, the courts must consistently and systematically apply its provisions. By enacting the Equal Access to Justice Act, Congress took a forward step toward consistency by making the United States subject to the provisions of section 1988. Moreover, the courts' consistent and liberal application of the prevailing party requirement enhances consistency. Finally, the Supreme Court's *Hensley* decision should narrow the range of possible fee awards in a given situation. However, some inconsistencies remain. Ad hoc decisions denying fee awards to prevailing parties because of "special circumstances" inject an unnecessary element of risk in assessing the chance for a fee award. Similarly, courts awarding fees at disparate rates unnecessarily confuses the extent to which fees are available.

As judges continue to apply section 1988, they must consider the impact of their decisions upon the Act's purpose. Decisions which restrict the applicability of section 1988 arguably inhibit an untold number of plaintiffs and counselors from enforcing civil rights laws, a goal of the utmost priority in our society.

Mark D. Boveri

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[132] The Senate Report indicates that the type of relief sought by the client should not impact the court's calculation of a reasonable fee. S. REP. NO. 94-1011, *supra* note 9, at 6, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5913.

REPORT
TO
CONGRESS

Civil Rights
Attorney's Fees Awards
Act of 1976

National Association
of
Attorneys General

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Attorney General of Kansas

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WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

February 3, 1984

The Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives

Senator Strom Thurmond
President Pro-Tempore of the Senate

Dear Speaker O'Neill and Senator Thurmond:

This Report is forwarded to you and your colleagues for use in your deliberations and debates of the issues raised by the federal courts' interpretation and application of the Civil Rights Attorney's Fees Awards Act of 1976. As documented herein, the serious problems that have emerged threaten to undermine the laudable purposes of the Act and violate the original intent of Congress.

This is a comprehensive overview of the experiences of the states with the Act; those experiences naturally vary in nature and intensity from judicial circuit to judicial circuit. This Report reflects a very broad consensus developed from that collective experience across as politically and geographically diverse a group as the Congress itself. Obviously the views of the Attorneys General may vary on certain points.

Whatever you may determine should be done, we are concerned that no change of law should diminish in any way the basic and fundamental civil rights which protect the individual citizens of the States and this Nation. We believe that implementation of the recommendations contained herein will further secure those rights and enhance their protection in the federal courts.

The Association wishes to call attention to the contribution of the offices of Attorneys General Kenneth O. Eikenberry of Washington and Francis X. Bellotti of Massachusetts for the research and writing of this Report. Senior Assistant Attorneys General Tom Carr of Washington and Carl Valvo and Judith Yogman of Massachusetts whose work has produced this Report deserve special recognition and appreciation.

No report in an area of law developing as rapidly in as many jurisdictions as this can be entirely current. We ask all readers to inform us of pertinent information and of their views. We hope you will find this Report useful and are ready to assist you in any way possible in your work.

Sincerely and respectfully,

Raymond Marvin

C. Raymond Marvin

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE, BOSTON 02108

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

January 27, 1984

C. Raymond Marvin
Executive Director
General Counsel
National Association of Attorneys General
Hall of the States
444 North Capitol Street
Washington, D.C. 20001

Dear Mr. Marvin:

In cooperation with Attorney General Kenneth O. Eikenberry, I am pleased to forward to you for distribution to the United States Congress a report entitled "Problems Arising From Implementation of the Civil Rights Attorney's Fee Award Act of 1976 and Recommendations For Change".

This report seeks to focus the attention of Congress on serious problems that have developed since passage of the Civil Rights Attorney Fees Act. My collegues and I believe these problems and their solution merit the early attention of the Congress.

Sincerely,

Francis X. Bellotti

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

OFFICE OF THE
ATTORNEY GENERAL

February, 1984

Mr. Ray Marvin
Executive Director
National Association of
Attorneys General
Hall of the States, Suite 403
444 North Capitol Street
Washington, D.C. 20001

Dear Mr. Marvin:

In cooperation with Attorney General Francis Bellotti of Massachusetts, I am pleased to forward the following report to the United States Congress on "Problems Arising from the Implementation of the Civil Rights Attorneys Fees Awards Act of 1976 and Recommendations for Change".

The report focuses on practices that we believe Congress did not intend, and on serious problems that have developed since passage of the act. My colleagues and I believe these concerns are so serious as to merit the early attention of the congress.

Very truly yours,

Ken Eikenberry

KEN EIKENBERRY
Attorney General

KE:jh

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NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

REPORT TO THE CONGRESS

Civil Rights Attorney's Fees Awards Act of 1976

"In any action or proceeding to enforce a provision of [several U.S. Code sections, including 42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988

February 1984

FOREWORD

. . . [O]ne of the least socially productive types of litigation imaginable [is] appeals from awards of attorney's fees . . .

. . . .

Ultimately, § 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit-splits) in its wake.

> Hensley v. Eckerhart, 103 S. Ct. 1933, 1944, 1951 (1983) (Brennan, Marshall, Blackmun, and Stevens, JJ., concurring in part and dissenting in part).

The only truly consistent thread that runs through federal court decisions on attorney's fees is their lack of consistency.

. . . .

[I]nordinately high fee awards in some cases, and the absence of a coherent rationale for justifiably large awards in other cases, have lent support to the sentiments of the Italian proverb that "a lawsuit is a fruit tree planted in a lawyer's garden."

> Berger, Court Awarded Attorney's Fees: What is "Reasonable"?, 126 Pa. L. Rev. 281, 292 (1977).

As the foregoing comments suggest, courts and commentators alike have become critical of attorney's fees litigation. Since passage of the Civil Rights Attorney's Fees Awards Act of 1976, one constant voice expressing concern has been that of the National Association of Attorneys General, which has continuously monitored the implementation and effect of the Act. On the basis of its collective experience, the Association has become increasingly concerned that the Act, as interpreted and applied by the courts, is operating contrary to its original purpose. Rather than simply facilitating access to the courts for disadvantaged victims of civil rights violations, a purpose that the Association wholeheartedly endorses, the Act has had the unintended effects of encouraging frivolous non-civil rights claims, deterring settlement of meritorious claims, awarding fees to plaintiffs who do not actually prevail, conferring unreasonable "windfall" fees on plaintiffs' counsel, draining public treasuries, and fostering an avalanche of litigation on attorney's fees that threatens to bury the underlying civil rights claims that the Act was intended to vindicate.

In this report, the Association outlines and documents these adverse and unintended applications of the Act and recommends the enactment of statutory standards that would restore the Act to its original purpose, provide needed guidance to the courts and the bar, and mitigate the possibility of abuse. In particular, the Association recommends that the Act be amended to apply solely to true civil rights cases; to define "prevailing party" in a realistic manner; to restore and guide judicial discretion to award or deny fees; to provide workable standards for computing a "reasonable" fee; to impose a ceiling on the hourly rates at which attorneys may be compensated; to prohibit the award of "bonuses" in excess of reasonable compensation for time reasonably spent by prevailing counsel; and to provide additional incentives for settlement.

This report begins with an outline of the Association's findings and recommendations, which is followed by a discussion and analysis of the basis for each finding and recommendation. After documenting the magnitude of the problem created by the lack of coherent and workable standards (Finding and Recommendation No.1), the report makes specific findings and recommendations concerning the scope of the Act (Finding and Recommendation No. 2), the standard for determining a party's eligibility for fees (Findings and Recommendations Nos. 3, 4, and 5), and the standard for calculating a "reasonable" attorney's fee (Findings and Recommendations Nos. 6, 7, and 8). Finally, the report discusses the adverse impact of the Act on the process of dispute resolution, both in and out of court, and recommends how that problem could be alleviated by legislative reform (Finding and Recommendation No. 9).

The various recommendations contained in this report are not intended to discourage or inhibit victims of civil rights violations from redressing their grievances through litigation. Rather, the intent of these recommendations is to turn the focus of civil rights litigation away from fee disputes and return it to the aggrieved parties whose rights the Act was intended to vindicate. This report does not take issue with the Congressional determination that a public entity that violates a person's civil rights should be burdened with having to pay attorney's fees necessary to prove such a violation. However, the process for awarding fees, the amounts of fees awarded, and the underlying claims must be viewed in light of the purposes of the original Act. As indicated by the findings contained in this report, the Act is operating contrary to its original purposes. Legislative action, along the lines recommended in this report, is urgently needed.

RESOLUTION

In plenary session on June 25, 1983, the Association adopted the following resolution:

WHEREAS, litigation under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, is expanding at an alarming rate, with further expansion in the future a near certainty; and

WHEREAS, lack of meaningful standards to determine what is a "reasonable" attorney's fee in any given case consistently results in exorbitant court-ordered fee awards paid from public treasuries of state and local governments and creates additional problems for public defendants; and

WHEREAS, cases decided under the Fees Act frequently involve the characterization of parties as "prevailing" for purposes of collateral attorney's fees requests when, in fact, they have not prevailed in any meaningful sense on the merits of their claim; and

WHEREAS, the reported Fees Act opinions so narrowly circumscribe the ability of lower courts to determine when special circumstances exist that justify outright denial of requested fees that the discretion expressly contemplated by the Fees Act itself can rarely be exercised at all; and

WHEREAS, a special subcommittee chaired by Attorney General Kenneth Eikenberry has studied abuses under 42 U.S.C. § 1988 and has compiled its findings into [this] Report;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Attorneys General:

1. Urges the Congress to adopt legislation that will eliminate these and other related problems that have resulted from abuses under 42 U.S.C. § 1988;

2. Commends Attorney General Eikenberry and members of the Subcommittee for the diligent work on this matter and adopts the Report as part of the Association's policy position; and

3. Authorizes its General Counsel to transmit these views to the appropriate members of the Administration and Congress.

INTRODUCTION

A. Purpose of the Civil Rights Attorney's Fees Award Act

The Civil Rights Attorney's Fees Awards Act of 1976 was passed in direct response to the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that federal courts do not have the power to award attorney's fees to a prevailing party without express statutory authorization.[1] Prior to *Alyeska*, federal courts had been awarding attorney's fees to the prevailing party in civil rights cases on the theory that, in bringing such cases, plaintiffs serve in the capacity of "private attorneys general," seeking to vindicate constitutional rights, not for themselves alone, but also for the benefit of others similarly situated. By holding that the federal courts lack authority to award fees under such circumstances, *Alyeska* "created anomalous gaps in our civil rights laws," which the Act was intended to fill.[2]

The Act was thus intended to remove financial barriers that would otherwise prevent access to the courts by disadvantaged plaintiffs acting in the role of private attorneys general, by affording successful civil rights plaintiffs "the opportunity to recover what it costs them to vindicate these rights in court."[3] Such a measure was viewed as desirable in order to enforce "major civil rights laws,"[4] protecting the most "basic" and "fundamental" civil rights.[5]

As a "narrowly drawn" response to *Alyeska*,[6] the Act was not intended as a wholesale abrogation of the "American Rule" that each

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1/ *Id.* at 269.

2/ S. Rep. No. 1011, 94th Cong., 2d Sess. 1,4 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908.

3/ 121 Cong. Rec. 26,806 (1975) (remarks of Sen. Tunney); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2 (1976).

4/ 122 Cong. Rec. 33,314 (1976) (remarks of Sen. Abourezk), 35,116 (remarks of Rep. Anderson).

5/ 121 Cong. Rec. 26,806 (1975) (remarks of Sen. Tunney); 122 Cong. Rec. 31,472, 33,314 (remarks of Sen. Kennedy), 35,115 (remarks of Rep. Anderson), 35,124 (remarks of Rep. Railsback), 35,126 (remarks of Rep. Fish), 35,127 (remarks of Rep. Holtzman) (1976).

6/ 122 Cong. Rec. 35,126 (remarks of Rep. Kastenmeier) (1976).

party must bear its own litigation costs. Rather, it was viewed by its proponents as "only a first step and a rather limited and cautious one."[7] The proponents of the Act repeatedly emphasized its limited purpose by reiterating that the Act was not intended to "aid [ ] lawyers,"[8] encourage meritless litigation,[9] or provide "windfalls" to prevailing counsel.[10] Rather, Congress stressed the Act's relatively moderate approach of authorizing courts, in their discretion, to award a "reasonable" attorney's fee to prevailing parties in certain civil rights cases, in contrast to that of more liberal statutes providing for mandatory fee awards or awards to non-prevailing parties.[11]

B. Good Intentions Gone Awry: A Need for Legislative Action

As will be shown in this report, the good intentions of Congress outlined above have not been realized. Rather than simply facilitate the vindication of meritorious civil rights claims, as Congress intended, the Act has operated to foster a flood of litigation on the entitlement to and amount of attorney's fees. Rarely has a federal statute had the immediate and explosive impact on litigation involving state officials as has this Act. Particularly after *Maine v. Thiboutot*, 488 U.S. 1 (1980),[12] it has become routine for all governmental litigation—from the most complex class actions for

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7/ *Id.*

8/ 122 Cong Rec. 33,314 (remarks of Sen. Kennedy), 35,127 (remarks of Rep. Jordan) ("This is not a food-stamp bill for lawyers. It is not going to work that way."), 35,128 (remarks of Rep. Sieberling) ("not a lawyers' bill") (1976).

9/ 121 Cong. Rec. 26,806 (1975) (remarks of Sen. Tunney) ("Bill would do nothing to encourage frivolous or bad faith litigation"); 122 Cong. Rec. 35,127 (remarks of Rep. Jordan), 35,128 (remarks of Rep. Sieberling) (1976); H.R. Rep. at 7.

10/ H.R. Rep. at 9; S. Rep. at 6.

11/ H.R. Rep. at 6-9; 122 Cong. Rec. 35,115-17 (remarks of Rep. Anderson and Rep. Railsback), 35,122-23 (remarks of Rep. Sieberline) (1976).

12/ In that case, the Supreme Court construed 42 U.S.C. SS 1983 and 1988 to apply to actions to enforce rights secured by any federal statute and ruled that such actions could be brought in state as well as federal courts.

institutional reform to the most commonplace complaints for state judicial review of administrative decisions—to include requests for attorney's fees under the Act. Not surprisingly, the soaring number of attorney's fees claims is reflected in the burgeoning amount of litigation engendered by the Act itself.

These developments are both undesirable and unnecessary. One can hardly conceive of a less socially valuable use of resources than fees litigation.[13] State and federal taxpayers are now routinely subjected to the spectacle of publicly-funded counsel making claims for fees to be paid by publicly-funded agencies, defended by publicly-funded attorneys general, and decided by publicly-funded courts. While no single participant in these exercises is exclusively responsible, it is the Association's firm belief that the lack of statutory standards governing the application for and adjudication of fee awards has unnecessarily encouraged unreasonably high requests, stymied settlement efforts, forced these matters into litigation, and permitted inconsistent, excessive, and ever-escalating fee awards. This chain of events has caused an outcry by the bench, the bar, and the tax-paying public for legislative reform.

The Association therefore urges the Congress to enact clear standards of eligibility for and computation of fee awards under the Act, in accordance with the recommendations contained in this report. Provision for such standards would render the application of the Act more consistent and, hence, more reasonable, to the mutual benefit of civil rights plaintiffs, state taxpayers, and the judiciary. Greater certainty would promote settlement, reduce fee litigation, and thereby permit counsel and the courts to devote more attention to substantive matters.

The Association wishes to emphasize that it endorses the salutary purpose of the Act and is committed to the Act's concept of reasonable fees to prevailing parties in civil rights cases. The recommendations contained in this report are intended to further the Act's original purpose while eliminating its unintended and undesirable side-effects.

13/ See Hensley v. Eckerhart, 103 S. Ct. 1933, 1944 (1983) (Brennan, Marshall, Blackmun, and Stevens, JJ., concurring in part and dissenting in part) (referring to fees litigation as "one of the least socially productive types of litigation imaginable").

FINDINGS OF THE ASSOCIATION

FINDING NO. 1: Litigation under the Fees Act is expanding at an alarming rate with further expansion in the future a near certainty.

FINDING NO. 2: The Act, as interpreted and applied by the courts, makes attorney's fees available not only in civil rights cases but in virtually all cases against state and local governments or officials.

FINDING NO. 3: Cases decided under the Fees Act frequently involve the characterization of parties as "prevailing" for purposes of attorney's fees awards when, in fact, they have not prevailed, in any meaningful sense, on the merits of their claims.

FINDING NO. 4: In cases where the requesting party has, in fact, prevailed to some extent, attorney's fees awards under the Act are frequently disproportionate to the degree of success actually achieved.

FINDING NO. 5: The Fees Act, as interpreted and applied by the courts, makes the award of fees to a prevailing party virtually mandatory, thereby eliminating the "discretion" expressly granted to the courts by the Act.

FINDING NO. 6: Lack of meaningful standards for determining what constitutes a "reasonable" attorney's fee in any given case results in inconsistent and often excessive fee awards and makes it difficult to settle claims for attorney's fees.

FINDING NO. 7: Courts routinely make "bonus" awards or apply "multipliers" to the hourly rates set for prevailing counsel, resulting in grossly inflated awards constituting a "windfall" to prevailing counsel.

FINDING NO. 8: In applying the Fees Act to prevailing parties represented by publicly-funded salaried attorneys, courts normally award fees based on hourly rates charged by private counsel, resulting in windfalls that substantially exceed the actual cost of the litigation.

FINDING NO. 9: The Fees Act affects the process of legal dispute resolution in a way that is unfair to public defendants and that further burdens the courts by:

A. making it more desirable for plaintiffs to commence litigation, rather than settle disputes informally;

B. making it more advantageous for plaintiffs to continue litigation rather than settle where any meritorious claim is presented;

C. making it less desirable, once litigation is underway, for public defendants to alter challenged laws, administrative regulations, or official positions in any way that favors the plaintiffs;

D. making it less desirable for public defendants to litigate those close issues that should be litigated; and

E. making it difficult for plaintiffs and defendants to settle claims for attorney's fees.

RECOMMENDATIONS OF THE ASSOCIATION

RECOMMENDATON NO. 1: The Congress should amend the Act, as specified in the further recommendations enumerated hereunder, to provide clear and precise standards governing eligibility for and computation of attorney's fees awards under the Act.

RECOMMENDATION NO. 2: The Congress should amend the Fees Act to apply only to civil actions to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right secured by a provision of the Constitution of the United States or an Act of Congress providing for individual civil rights of citizens or of all persons within the jurisdiction of the United States.

RECOMMENDATION NO. 3: The Congress should amend the Fees Act to require that, in order to be eligible for a fee award, a party must clearly and substantially prevail on the merits of each issue or claim as to which fees are being sought.

RECOMMENDATION NO. 4: The Congress should amend the Fees Act to require that courts apportion the amount of fee awards to the degree of success actually attained by the prevailing party.

RECOMMENDATION NO. 5: The Congress should amend the Fees Act to provide expressly that a court may deny fees where, in the court's view, denial is appropriate, including, but not limited to, cases in which the court determines:

A. that the defendant's position was substantially justified or advanced in good faith; or

B. that an award of fees would not further the substantive purposes of the Act.

RECOMMENDATION NO. 6: The Congress should amend the Fees Act to provide that the prevailing party shall not be awarded fees in excess of $75 per hour.

RECOMMENDATION NO. 7: The Congress should amend the Fees Act to prohibit the award of bonuses or multipliers in excess of compensation at a reasonable hourly rate for the number of hours reasonably spent by prevailing counsel.

RECOMMENDATION NO. 8: The Congress should amend the Fees Act to provide that, where the prevailing party is represented by a publicly-funded legal services organization, courts should compute a reasonable hourly rate for such counsel based on the actual costs of the litigation to the organization, including the proportion of the attorney's annual salary and of the organization's annual overhead attributable to the number of hours reasonably spent on the case.

RECOMMENDATION NO. 9: The Congress should amend the Fees Act to provide that the court shall deny attorney's fees to a prevailing party, where it determines:

A. that the lawsuit was brought principally for the purpose of obtaining attorney's fees; or

B. that the prevailing party rejected an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure, or a cognate state rule of procedure, that was more favorable than the relief ultimately granted by the court, in which case no fees shall be awarded for the services rendered after the date of the offer.

DISCUSSION OF FINDINGS AND RECOMMENDATIONS

Finding No. 1: Litigation under the Fees Act is expanding at an alarming rate with further expansion in the future a near certainty.

Since the inception of the Act in 1976, litigation on eligibility for and computation of attorney's fees has mushroomed. The number of reported cases involving attorney's fees is tremendous. West's annotations to 42 U.S.C. § 1988 now fill 179 closely printed pages.[14] A computer search for cases arising under § 1988 revealed almost 3,000 federal and state decisions as of December 1983. The advance sheets routinely report numerous attorney's fees cases each week; and the Supreme Court decides fee cases every term, while declining to review many more. Indeed, in just one month in 1980, the Court rendered six major attorney's fees decisions.[15]

This explosion of fee litigation has engendered numerous law review articles,[16] and several treatises on the subject,[17] as well as a bi-monthly newsletter designed to keep attorneys apprised of current developments in the area of attorney's fees.[18] As noted by Lloyd Cutler,[19] in his Foreword to a recent three-volume treatise on court-awarded attorney's fees, this Act and other similar fee-

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14/ 42 U.S.C.A. § 1988 (West 1981) at 155-305 and (West Supp. 1983) at 13-48.

15/ Maher v. Gagne, 448 U.S. 122 (1980); Maine v. Thiboutot, 448 U.S. 1 (1980); Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); New York Gaslight Club v. Carey, 447 U.S. 54 (1980); Hanrahan v. Hampton, 446 U.S. 754 (1980); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980).

16/ See, e.g., Note, Awards of Attorney's Fees in the Federal Courts, 56 St. John's L. Rev. 277 (1982) (citing numerous other articles on the subject); see also Fioretti & Convery, Attorney's Fees Under the Civil Rights Act—A Time for Change, 16 J. Mar. L. Rev. 261 (1983).

17/ E. Larson, Federal Court Awards of Attorney's Fees (1981); H. Newberg, Public Interest Practice and Fee Awards (1981); M. Derfner & A. Wolf, Court Awarded Attorney Fees (1983).

18/ Attorney Fee Awards Reporter (Harcourt Brace Jovanovich).

19/ L. Cutler, Foreword to Derfner & Wolf, supra at vii.

shifting statutes "have created a new field of law that has grown so fast and become so complex that it has baffled the efforts of courts and lawyers to comprehend and apply it."

The vast amount of litigation on attorney's fees has led the courts to complain that "the fee proceedings have become the main event rather than the side show", such that "the [attorney's fees] tail is wagging the [civil rights] dog."[20] The Supreme Court has added its voice to this mournful chorus, recently stating that "a request for attorney's fees should not result in a second major litigation."[21] Other concurring and dissenting justices in the same case characterized fee litigation as "one of the least socially productive types of litigation imaginable" and bemoaned the fact that "[s]uch appeals [from fee awards], which greatly increase the costs to plaintiffs of vindicating their rights, frustrate the purposes of § 1988."[22] Those justices went on to state that:

> Congress enacted § 1988 . . . not to spawn litigation, however interesting, over [attorney's fees] . . . . In systemic terms, attorney's fees appeals take up lawyers' and judges' time that could more profitably be devoted to other cases, including the substantive civil rights claims that § 1988 was meant to facilitate.
>
> Ultimately, § 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit-splits) in its wake.[23]

As the above quotation indicates, the flood of litigation under § 1988 has done little to resolve the many questions arising from its implementation. Very few hard and fast rules have developed, and

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20/ Mills v. Eltra Corp., 663 F.2d 760, 761 (7th Cir. 191) (186 hours devoted to case on the merits and over 350 hours on the fee portion).

21/ Hensley v. Eckerhart, 103 S. Ct. 1933, 1941 (1983).

22/ Id. at 1944 (Brennan, Marshall, Blackmun, and Stevens, JJ., concurring in part, dissenting in part).

23/ Id. at 1950-51.

conflicts exist not only among circuits but often among the district courts or panels of a single circuit.[24] As a result of this continuing confusion, litigation in this area will undoubtedly continue to expand. For example, as indicated by the numerous lower-court majority and dissenting opinions citing or "explaining" Hensley v. Eckerhart,[25] the Supreme Court's latest "pronouncement" on § 1988, that case, like many of its predecessors, has apparently raised as many questions as it has answered.

Apparently, the confusion over the proper interpretation and application of § 1988 can be resolved only by the Congress. As noted by one commentator,

> Because [fee-shifting] is contrary to two hundred years of experience in American federal courts, the cases have been difficult for lawyers and judges alike. Understanding has not been materially helped by Congress which has frequently passed attorney fee provisions with . . . only minimal or inconsistent direction on how the measures are to be interpreted and applied.

Derfner & Wolf, supra at ix. Only by setting clear statutory standards for the application of the Act can the rising tide of needless litigation be stemmed.

> **Recommendation No. 1: The Congress should amend the Act, as specified in the further recommendations enumerated hereunder, to provide clear and precise standards governing eligibility for and computation of attorney's fees awards under the Act.**

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[24] Compare, e.g., New York Association for Retarded Citizens v. Carey, 711 F.2d 1136 (2d Cir. 1983) with Stenson v. Blum, No. 81-7385 (2d Cir. 1982), cert. granted, 103 S. Ct. 2426 (1983); compare also National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982), with Environmental Defense Fund, Inc. v. EPA, 672 F.2d 42 (D.C. Cir. 1982), and Jordan v. United States Department of Justice, 691 F.2d 514 (D.C. Cir. 1982).

[25] 82 Shepard's United States Citations (Supp. No. 6) at 308 and (Supp. No. 7) at 96.

Finding No. 2: The Act, as interpreted and applied by the courts, makes attorney's fees available not only in civil rights cases but in virtually all cases against state and local governments or officials.

The proponents of § 1988 touted the Act, as its name implies, as a measure designed to protect "basic" and "fundamental" civil rights by encouraging private enforcement of our "major civil rights laws," including § 1983. 26/ Although there is strong evidence that Congress viewed § 1988 as a civil rights measure, 27/ the Supreme Court subsequently held in Maine v. Thiboutot that fees are available not only in civil rights cases but in any action under § 1983, which the Court construed to include cases arising under any federal statute or constitutional provision. 28/ In response to the state's argument that such a construction is contrary to legislative intent, the Court suggested that "[t]hat argument . . . can best be addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of § 1983." 29/ In his dissenting opinion in Maine v. Thiboutot, Justice Powell predicted that the Court's decision would "dramatically expand the liability of state and local officials and may virtually eliminate the 'American Rule' in suits against those officials." In Justice Powell's prescient view, the

> practical effect [of the majority opinion] means that state and local governments, officers and employees now face liability whenever a person believes that he has been injured by the administration of any federal-state cooperative program, whether or not that program is related to equal or civil rights.

26/ See floor debates and House and Senate reports cited in Introduction, supra.

27/ See Maine v. Thiboutot, 488 U.S 1, 25-26 (1980) (Powell, J., dissenting); Comment, The Scope of the Civil Rights Attorney's Fees Awards Act After Maine v. Thiboutot, Maher v. Gagne, and Supreme Court of Virginia v. Consumers Union, 66 Iowa L. Rev. 1301, 1311-13 (1981); Case Comment, Statutory Non-Civil Rights Violations of Section 1983 and Awards of Attorney's Fees After Maine v. Thiboutot, 61 B.U. L. Rev. 1069, 1086-89 (1981).

28/ Id. at 4-9.

29/ Id. at 8.

> . . . [I]ngenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant.[30]

Even at that time, Justice Powell observed that "[t]here is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought."[31]

Unfortunately for state governments and their taxpayers, Justice Powell's prediction has now become a painful and expensive reality. Fees are now routinely sought and awarded in even the most routine state court reviews of administrative agency decisions, having little or no bearing on civil or equal rights. For example, the Supreme Judicial Court of Massachusetts ruled that a plaintiff who succeeded in obtaining a reversal of an administrative decision, thereby obtaining $250 toward the purchase of a washing machine, was entitled to attorney's fees under § 1988. The court reasoned that since the plaintiff's complaint contained a claim, not reached by the court, that the regulation in question violated the Equal Protection Clause of the United States Constitution (by discriminating between those who have broken-down washing machines and those who have none), a claim which the court viewed as "substantial," the action was one to enforce the provisions of § 1983, thereby invoking the fee-shifting provisions of § 1988.[32]

The Stratos case illustrates another related problem that has arisen under § 1988. Relying on statements in the legislative history of the Act that, in cases containing both § 1983 and non-§ 1983 claims, if the § 1983 claim meets the "substantiality" test articulated in Hagans v. Lavine, 415 U.S. 528 (1974), then attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim,[33] courts have often awarded fees where the § 1983 claim is weak, but not "obviously frivolous," "absolutely devoid of merit," or "wholly insubstantial."[34] As noted by Justice Rehnquist in his dissenting opinion in Hagans, the substantiality test is met whenever the "plaintiff is able to plead his claim with a straight face."[35] The effect of that test is therefore to stand the concept of federalism on its head by "federalizing" nearly all claims against state or local officials.[36]

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[30] Id. at 22, 24.

[31] Id. at 24.

[32] Stratos v. Department of Public Welfare, 387 Mass. 312 (1982). Although the court viewed the claim as "substantial" under the "painstakingly minimal standard of substantiality defined in Hagans v. Lavine," id. at 319, it expressed doubt that plaintiff could have actually prevailed on his equal protection claim, given the minimal level of scrutiny applicable to classifications drawn by law or government practice where, as here, no suspect classification or fundamental right is involved. Id. at 318.

The application of the substantiality test to § 1988 means that plaintiffs can recover fees under § 1988, even when they lose on their federal civil rights claims. For example, in Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977), the district court had ruled in plaintiff's favor on state law grounds but had ruled against him on his § 1983 claim. Nevertheless, the Sixth Circuit held that plaintiff was entitled to fees under § 1988, since his claim under § 1983 was "substantial."

Clearly, in enacting § 1988, Congress did not intend to encourage litigants to pad their meritorious state law complaints with weak or meritless civil rights claims, in order to obtain fees under § 1988. Yet, that is the net effect of the case law discussed above. Congress must therefore act to clarify its original intent that § 1988 be used to enforce our most basic and fundamental civil rights. The Association is concerned that the statute not be revised so as to impair individuals seeking full redress for violations of their civil or equal rights. However, the Association believes that a restoration of the scope of the Act to pre-Thiboutot coverage is necessary.

In so acting, Congress will be able to answer a number of nagging questions concerning the proper scope of the statute: should it apply to cases brought by corporations or other business entities? Should it apply to all cases raising constitutional questions? One case

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33/ H.R. Rep. at 4 n. 7. It should be noted that the test of "substantiality" articulated in Hagans was developed for purposes of federal jurisdiction and is therefore ill-suited to determining whether a party has prevailed on the merits. See M. Derfner & A. Wolf, Court Awarded Attorney Fees, ¶ 12.01 (1983).

34/ Hagans v. Lavine, supra at 536-43; see Stratos, supra at 319.

35/ Id. at 564.

36/ See M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶¶ 12.01-03 (1983).

that raises these questions and has already sparked considerable public criticism is Grendel's Den v. Larkin, No. 77-3418-T (D. Mass.). In that case, Harvard Law School Professor Lawrence Tribe is seeking almost $350,000 in attorney's fees and costs for his successful efforts to obtain a liquor license for a restaurant in Harvard Square. Although the Supreme Court's decision on the merits of that case was based on the Due Process and Establishment Clauses of the United States Constitution, it is unlikely that this liquor license matter is the type of case that Congress had in mind when it enacted § 1988 as a means of protecting disadvantaged victims from violations of their most basic human rights.[37]

> **Recommendation No. 2:** The Congress should amend the Fees Act to apply only to civil actions to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right secured by a provision of the Constitution of the United States or an Act of Congress providing for individual civil rights of citizens or of all persons within the jurisdiction of the United States.

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[37] See 122 Cong. Rec. 35,122 (1976) (remarks of Rep. Drinan, sponsor) (Act passed to encourage enforcement of civil rights by "'private attorney[s] general' advancing the rights of the public at large, and not merely some narrow parochial interest").

Finding No. 3: Cases decided under the Fees Act frequently involve the characterization of parties as "prevailing" for purposes of attorney's fees awards when, in fact, they have not prevailed, in any meaningful sense, on the merits of their claims.

Although the Act expressly provides that only a "prevailing" party may be awarded fees, the application of this provision by the courts to cases where parties have not prevailed in any meaningful sense has effectively eliminated the prevailing party requirement, contrary to the express language of the statute and the underlying Congressional intent. In numerous cases where judgment was rendered for the defendant, courts have nevertheless viewed the plaintiff as a prevailing party for purposes of § 1988 fee awards. For example, in NAACP v. Wilmington Medical Center, Inc., 689 F.2d 1161 (3rd Cir. 1982), cert. denied, 103 S. Ct. 1499 (1983), the district court dismissed plaintiffs' claims against the state and federal defendants and, after trial, held that plaintiffs had failed to prove discrimination by the Wilmington Medical Center and accordingly entered judgment for the defendants and denied plaintiffs' request for fees. On appeal, the Third Circuit reversed the denial of fees, stating that "[t]he fact that a judgment was ultimately entered in favor of [the defendant] does not make the plaintiffs any less the prevailing party. 38/ The court ruled that plaintiffs had "prevailed" since they had obtained "some of the benefits sought by the litigation," even though the actual "benefits" obtained, by means of an agreement between the state and federal defendants, had been vigorously but unsuccessfully opposed by the plaintiffs in the litigation. 39/

Similarly, in Dayan v. Board of Regents, 620 F.2d 107 (5th Cir. 1980), the Fifth Circuit affirmed the district court's ruling for the defendant on the merits, that the defendant's "rational procedural policy violates neither the First Amendment nor the Fourteenth Amendment to the United States Constitution," yet also affirmed an award of fees to the plaintiffs on the ground that they had obtained "substantial voluntary relief as a direct result of their lawsuit." 40/ Another example of an award of fees to a losing party appears in Ross v. Horn, 598 F.2d 1312 (3rd Cir. 1979), cert. denied, 448 U.S. 906 (1980), in which the appellate court remanded the case for a redetermination of plaintiffs' eligibility for fees while, at the same

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38/ Id. at 1167.

39/ Id. at 1167-68.

40/ Id. at 108 (emphasis omitted).

time, affirming the district court's holding that the procedures employed by the defendant in processing suspected unemployment fraud cases adequately protected plaintiffs' statutory and constitutional due process rights.

In a number of cases, plaintiffs have been awarded fees where the benefits sought in their complaint were obtained by legislative action before a final judicial decision could be rendered on the merits. For example, in DeMier v. Gondles, 676 F.2d 92 (4th Cir. 1982), plaintiffs who voluntarily dismissed their claim after the state legislature enacted a statute that achieved the object of the suit were awarded fees, even though other complaints may have contributed to the change in policy.[41]

A striking example of the inequities that can result is Institutionalized Juveniles v. Secretary of Public Welfare, 568 F. Supp. 1020 (E.D. Pa. 1983). There, defendants had prevailed in the United States Supreme Court on what the District Court recognized were the central issues of the case. Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979). Nonetheless, the District Court awarded almost $90,000 in fees, including a 50 percent multiplier, based on its view that various regulatory and statutory changes during the period of litigation provided some of the plaintiffs with some of the benefits they sought. An appeal is pending.

Although the legislative history of § 1988 indicates that the term "prevailing party" is to be read broadly to include cases that end in a consent decree or out-of-court settlement, "none of the cases cited in the House or Senate Reports involves a fee award in the context of such a remote and extra-judicial resolution of a lawsuit as legislative preemption."[42] Furthermore, even if such a result had been intended by the enactors of § 1988, the problems involved in determining whether and to what extent a particular lawsuit acted as a "catalyst" for legislative change, make the application of the "prevailing party" standard to cases mooted by legislative action judicially unworkable. Since legislators act from multifarious motives, it is difficult, if not impossible, to determine the impact of a particular lawsuit on a legislative body as a whole.[43] Moreover, as recognized by one court, even attempting to make such a determination "might constitute an impermissible inquiry into legislative motive."[44]

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[41] See also Armstrong v. Reed, 462 F. Supp. 496 (N.D. Miss. 1978) (where state statute was amended while case was pending, judgment entered in state defendants' favor, but fees awarded to plaintiffs since they "accomplished their goal"); Coalition for Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982) (the First Circuit reversed the district court's denial of fees and awarded approximately $15,000 to the plaintiffs, based on their "success" in obtaining a short injunction pending appeal of a lower court denial of a requested preliminary injunction, even though the actual benefits, appropriation of welfare funds, were conferred by the state legislature, not by the defendants or the court, even before the injunction went into effect).

[42] Cicero v. Olgiati, 473 F. Supp. 653, 655 (S.D. N.Y. 1979).

Cases resolved by settlement present similar problems. For example, in *Young v. Kenley*, 641 F.2d 192 (4th Cir. 1981), the Fourth Circuit reversed a denial of attorney's fees to a plaintiff who alleged discrimination in the denial of a position for which she had never even applied. Once plaintiff applied for the position, after being urged to do so by the defendants and the district court, she passed the required test and was given the position in question, and the case was settled on that basis. Over the strong dissent of Justice Rehnquist, joined by Justice O'Connor, the Supreme Court denied a petition for a writ of certiorari on the prevailing party issue.[45] In his dissent from the denial of certiorari, Justice Rehnquist suggested that an award of fees in such circumstances "seems largely to disregard th[e] central purpose of § 1988 [—] . . . to 'enforce' the civil rights laws or to . . . promote[ ] their policies for the benefit of the public at large," and indicated that fees should not be awarded "if the discernible benefit was conferred gratuitously by the defendant or was taken simply to avoid further litigation expenses."[46] Nevertheless, on remand, the district court ultimately awarded fees in an amount exceeding $30,000.

Thus, although Congress stressed that § 1988, unlike other more liberal fee provisions, was intended to apply only where a party has "prevailed," [47] that intent has been undercut by subsequent court decisions construing the term "prevailing" so broadly as to include cases where the party awarded fees has actually lost the case on the merits or failed to succeed in any meaningful sense. Congress must therefore reassert its initial intent in a manner that will prevent such perversions of the statute's seemingly straightforward prevailing party requirement.

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[43] M. Derfner & A. Wolf, *Court Awarded Attorney Fees* ¶ 9.02 (1983).

[44] *Bly v. McLeod*, 605 F.2d 134, 138 n. 6 (4th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

[45] *Kenley v. Young*, 455 U.S. 961 (1982).

[46] *Id.* at 967.

> Recommendation No. 3: The Congress should amend the Fees Act to require that, in order to be eligible for a fee award, a party must clearly and substantially prevail on the merits of each issue or claim as to which fees are being sought.

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[47] *See, e.g.,* H.R. Rep. at 6-7. *Compare, Vermont Low Income Advocacy Council, Inc. v. Usery,* 546 F.2d 509, 36 A.L.R. Fed. 519 (2nd Cir. 1976), applying stricter test under attorney's fees provision of the Freedom of Information Act (FOIA), 5 U.S.C. § 522 (a)(4)(E) under which "court may assess against the United States reasonable attorneys fees . . . in any case . . . in which the complainant has substantially prevailed".

Finding No. 4: In cases where the requesting party has, in fact, prevailed to some extent, attorney's fees awards under the Act are frequently disproportionate to the degree of success actually achieved.

In many cases, large amounts of fees have been awarded, despite the fact that the plaintiff received only nominal relief on the merits. For example, in *Skoda v. Fontani*, 646 F.2d 1193, 1194 (7th Cir. 1981), the court held that plaintiffs, who won a jury verdict of only one dollar on their civil rights claim, for which they had claimed $200,000 in damages, were "prevailing parties," contrary to the district court's conclusion. On remand, the district court reluctantly awarded plaintiffs $6,086.12 in fees and costs.[48] Similarly, in *Milwe v. Cavuoto*, 653 F.2d 80, 83-84 (2d Cir. 1981), the court held that "the one dollar assessed against [the defendant] on plaintiff's constitutional claim would be sufficient to support an award of fees under the Act."

Another case in which the amount of fees awarded was grossly disproportionate to the degree of success on the merits is *Rivera v. City of Riverside*, 679 F.2d 795 (9th Cir. 1982), in which the Ninth Circuit found no abuse of discretion in the district court's award of $243,343.75 in fees incurred in obtaining a jury verdict of $33,350. An even more extreme example of a court's failure to proportion a fee award to the degree of success obtained is the decision reached in *Haygood v. Younger*, No. S-75-738LKK (E.D. Cal. 1983), a case in which plaintiff alleged illegal confinement in a state prison. The complaint named sixteen defendants and alleged nineteen separate causes of action. After five years of pre-trial proceedings, eleven defendants were dismissed or granted summary judgment, and seventeen causes of action were dismissed. Three defendants were granted a directed verdict after the plaintiff's case in chief. The jury returned a verdict of $640 against one of the remaining defendants and $1,450 against the other. The plaintiff then sought $75,968.75 in attorney's fees. Included was a demand for $17,831.25 in "paralegal fees" for assistance claimed to have been provided by the plaintiff's inmate advisor. The defendants' request for discovery and for an evidentiary hearing to contest the fee request were both denied by the court. The court then awarded $45,383.17 in attorney's fees, including $9,900 in paralegal fees for the inmate advisor. The award was apparently reduced from the amount originally requested only because counsel's representation had been of poor quality and the hours claimed had been "padded."

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[48] 519 F. Supp. 309 (N.D. Ill. 1981).

The effect of such decisions is to encourage civil rights plaintiffs to pad their complaints with multiple, meritless claims, "secure in the knowledge that any tactic reasonably related to his cause will be compensable." 49/ Not only is the "penalty" incurred by the defendant in such cases disproportionate to the injury inflicted, but such results also operate to the disadvantage of plaintiffs (as opposed to their counsel). Plaintiff's counsel, who can expect to be compensated for time spent on all claims, if he prevails to any extent, has no incentive to settle a case in the early stages of litigation, but rather is encouraged to litigate every claim to the maximum extent. Aggrieved plaintiffs are thereby deprived of the benefit of an early settlement, and courts, as well, are subjected to congested dockets. 50/

The Supreme Court's recent decision in Hensley v. Eckerhart, 103 S. Ct. 1933 (1983), directing the lower court to reconsider the amount of its fee award in light of the extent of success achieved by the plaintiffs, is a step in the right direction, but it will not resolve all of the problems discussed above and may raise additional ones. For example, it remains to be seen how the lower courts will resolve the apparent contradiction between the Court's directive that, in cases where plaintiffs only partially succeed, the "results obtained" may warrant a downward adjustment in the amount of fees awarded, 51/ with its caveat that "[w]here a plaintiff has obtained excellent results . . . the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." 52/ Rather than "clarify the proper relationship of the results obtained to an award of attorney's fees," as the Hensley case purports to do, 53/ it will undoubtedly generate further litigation on what constitutes an "unrelated claim" or "excellent results." 54/ As stated by Justice Brennan in his concurring and dissenting opinion in Hensley, "Regular appellate scrutiny of issues like those in this

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49/ Fioretti & Convery, Attorney's Fees Under the Civil Rights Act—A Time for Change, 16 J. Mar. L. Rev. 261, 278 (1983).

50/ Id.

51/ Id. at 1940.

52/ Id.

53/ Id. at 1939.

54/ See id. at 1950 (Brennan, J., concurring in part and dissenting in part).

case . . . generates a steady stream of opinions, each requiring yet another to harmonize it with the one before or the one after."[55] Indeed, in post-*Hensley* cases in the lower courts, *Hensley* is relied upon by fee applicants and opponents alike and is cited in both majority and dissenting opinions,[56] indicating that additional legislative guidance is needed on the propriety of apportioning the amount of fees awarded to the degree of success attained by the prevailing party.

> **Recommendation No. 4: The Congress should amend the Fees Act to require that courts apportion the amount of fee awards to the degree of success actually attained by the prevailing party.**

55/ *Id.* at 1951.

56/ *See* 82 *Shephard's United States Citations* (Supp. No. 6) at 368 (Supp. No. 7) at 96.

Finding No. 5: The Fees Act, as interpreted and applied by the courts, makes the award of fees to a prevailing party virtually mandatory, thereby eliminating the "discretion" expressly granted to the courts by the Act.

The proponents of the Fees Act emphasized the discretionary nature of the Act, which expressly provides that "the court, *in its discretion, may* allow the prevailing party . . . a reasonable attorney's fee" (emphasis added), and contrasted that Act with other statutes *requiring* that fees be awarded to a prevailing party. [57] However, the Senate Report suggested that, in exercising their discretion, courts should apply the standard articulated by the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), i.e., that a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

That standard, which has become known as the *Newman* standard, "was initially used by the courts to explain or justify the *mandatory* imposition of fees." [58] Application of such a standard is appropriate where the purpose of the fee provision is "to *encourage* suit or to provide an *incentive* to litigate," [59] not where the provision in question was enacted "mainly for the purpose of preventing the cost of litigation from *deterring* a suit." [60] Since the purpose of § 1988, as articulated by its proponents, was not to encourage litigation, but rather "to insure that the high cost of litigation does not bar the federal court to citizens who seek to

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57/ *See* H.R. Rep. at 8. Approximately half of the federal fee-shifting statutes are mandatory. M. Derfner & A. Wolf, *Court Awarded Attorney Fees* ¶ 5.02 [2] (1983); *see, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b); Truth in Lending Act, 15 U.S.C. §§ 1640(a), 1667b(a), 1667d(a), 1681n, 1681o, 1931e(d); Civil Service Reform Act of 1978, 5 U.S.C. § 5596(b) (1) (A) (ii); Right to Financial Privacy Act of 1978, 12 U.S.C. § 3417(a)(4).

58/ Derfner & Wolf, *supra* at ¶ 10.01 (emphasis added). *See, e.g.*, *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943).

59/ Derfner & Wolf, *supra* at ¶ 10.01.

60/ *Id.* (emphasis added).

enforce their rights under our civil rights laws,"[61] the rationale underlying the *Newman* standard is inapplicable to § 1988.

Despite the incompatibility of the *Newman* standard with the overall purpose of the Act, and although Congress chose not to use the *Newman* language in § 1988,[62] most courts, in reliance on the Senate Report, interpret § 1988 in a manner contrary to its express language.[63]

The practical effect of the application of the *Newman* standard to § 1988 is to make the award of fees to a prevailing party mandatory, since courts have rejected virtually every "special circumstance" proferred by defendants as a justification for denying fees.[64] Among the special circumstances that have been rejected by appellate courts as rendering an award of fees unjust are defendants' good faith,[65] defendants' reliance on previous court orders or government regulations,[66] that defendants' refusal to expend funds was based on lack of legislative appropriation,[67] that defendants were compelled by law to engage in the challenged conduct,[68] that plaintiff received only nominal damages,[69] that the fee award would be paid by a public entity and would thereby impair that entity's ability to provide further services,[70] that plaintiffs were able to afford counsel,[71] that plaintiffs refused to settle,[72] and that the suit did little or nothing to further civil rights.[73] Even the fact that the plaintiff committed perjury during

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[61] 122 Cong. Rec. 31,471 (1976) (remarks of Sen. Mathias). *See also* 122 Cong. Rec. 31,472 (remarks of Sen. Kennedy), 35,118, 35,128 (remarks of Rep. Sieberling), 35,126 (remarks of Rep. Fish) (1976); H.R. Rep. at 1, 2-3, 6; S. Rep. at 2, 3, 6.

[62] *Compare, e.g.*, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 2310(d) (2), which provides as follows:

> If a consumer finally prevails . . . he may be allowed by the court to recover . . . attorney's fees . . ., unless the court in its discretion shall determine that such an award of attorney's fees would be inappropriate.

[63] Fioretti & Convery, *Attorney's Fees Under the Civil Rights Act—A Time for Change*, 16 J. Mar. L. Rev. 276 (1983).

[64] Derfner & Wolf, *supra*, at ¶ 10.02[3] (1983); Fioretti & Convery, *supra* at 276; *Judicial Discretion and the 1976 Civil Rights Attorney's Fees Awards Act: What Special Circumstances Render an Award Unjust?*, 51 Fordham L. Rev. 320 (1982).

65/ See, e.g., Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 739 (1980); Hutto v. Finney, 437 U.S. 678, 693 (1978); Nadeau v. Helgemoe, 581 F.2d 275, 280 (1st Cir. 1978); Holley v. Lavine, 605 F.2d 638, 646 (2d Cir. 1979), cert. denied, 446 U.S. 913 (1980); Bills v. Hodges, 628 F.2d 844, 847 (4th Cir. 1980); Ellwest Stereo Theatre, Inc. v. Jackson, 653 F.2d 954, 956 (5th Cir. 1981); Haycraft v. Hollenbach, 606 F.2d 128, 132 (6th Cir. 1979); Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980); Pickett v. Milam, 579 F.2d 1118, 1121 (8th Cir. 1978); Seattle School District No. 1 v. Washington, 633 F.2d 1338, 1349 (9th Cir. 1980), aff'd, 102 S. Ct. 3187 (1982); Love v. Mayor, 620 F.2d 235, 236 (10th Cir. 1980).

66/ See, e.g., Crosby v. Bowling, 683 F.2d 1068, 1072-73 (7th Cir. 1982); Johnson v. Mississippi, 606 F.2d 635, 637 (5th Cir. 1979).

67/ See, e.g., Coalition for Basic Human Needs v. King, 691 F.2d 597, 602 (1st Cir. 1982).

68/ See, e.g., Ellwest Stereo Theatre, Inc. v. Jackson, supra at 956.

69/ See, e.g., Skoda v. Fontani, 646 F.2d 1193 (7th Cir. 1981).

70/ See, e.g., Morrison v. Ayoob, 627 F.2d 669, 673 (3rd Cir. 1980), cert. denied, 449 U.S. 1102 (1981).

71/ See, e.g., Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497, 507 (7th Cir. 1980), cert. denied, 450 U.S. 919 (1981).

72/ See, e.g., Coop v. City of South Bend, 635 F.2d 652, 655 (7th Cir. 1980).

73/ See, e.g., Concerned Democrats v. Reno, 689 F.2d 1211 (5th Cir.), rev'g 493 F. Supp. 660 (S.D. Fla. 1980).

trial has been rejected as a special circumstance justifying a denial of fees.[74/]

As a result, one judge has described the application of the special circumstances exception by the courts as

> render[ing] [the exception] in effect a nullity. This interpretation is reminiscent of the passage wherein Macbeth remarked, "Life is but a walking shadow; . . . a tale told by an idiot, full of sound and fury, signifying nothing."[75/]

Moreover, where fees are awarded despite the fact that, for example, the defendant acted in good faith, the plaintiff obtained only nominal damages, and the action did nothing to further civil rights, "a question arises as to what goals of the Attorney's Fees Act, if any, are being furthered."[76/] In such cases, "the only true victor may be the plaintiff's attorney."[77/]

Furthermore, given the prospect of a mandatory fee award if he prevails, plaintiff's counsel has no incentive to enter into a pretrial settlement. The more time he spends on the case, the higher his potential fee award. The motivation to proceed to trial is therefore enhanced, and the incentive to settle, diminished.[78/]

Therefore, in order to restore the judicial discretion expressly intended by the Act, but virtually eliminated in its application, Congress should amend the Act to specify circumstances in which the courts' discretion may be exercised to deny fees. Such an amendment would not only further the original purpose of the Act, but would also be consistent with the standard applicable to fee awards against federal defendants under the Equal Access to Justice Act, which expressly provides that fees are not to be awarded when the

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[74/] Price v. Pelka, 690 F.2d 98 (6th Cir. 1982).

[75/] Connor v. Winter, 519 F. Supp. 1337, 1348 (S.D. Miss. 1981) (Cox, J., dissenting).

[76/] Fioretti & Convery, supra at 277.

[77/] Id.

[78/] Fioretti & Convery, supra at 277.

government, has demonstrated a substantial justification for its position.[79] Since the purpose of the Equal Access to Justice Act, as set forth in its legislative history,[80] is parallel to that of the Fees Act, there is no reason why state and local defendants should not share the protection, enjoyed by federal defendants under the Equal Access to Justice Act, from the imposition of unjust awards of attorney's fees.

> Recommendation No. 5: The Congress should amend the Fees Act to expressly provide that a court may deny fees where, in the court's view, denial is appropriate, including, but not limited to, cases in which the court determines:
>
> A. that the defendant's position was substantially justified or advanced in good faith; or
>
> B. that an award of fees would not further the substantive purposes of the Act.

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[79] 5 U.S.C. § 504(a) (1); 28 U.S.C. § 2412(d) (1) (A). Congress created this exception as a "safety valve" to preclude fee awards when the federal government "advance [ed] in good faith the novel but credible extension and interpretations of the law that often underlie vigorous enforcement efforts." S. Rep. No. 253, 96th Cong., 2d Sess. 7 (1980). See also, Vermont Low Income Advocacy Council, Inc. v. Usery, supra, at 36 ALR F. at 525, 526. (FOIA attorney's fees would not be awarded if the the government's withholding of information "had a reasonable basis in law").

[80] See Pub. L. No. 96-481, § 201, H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 4984 (purpose of Act is to remove the financial deterrent to litigation against the United States).

Finding No. 6: Lack of meaningful standards for determining what constitutes a "reasonable" attorney's fee in any given case results in inconsistent and often excessive fee awards and makes it difficult to settle claims for attorney's fees.

At the time Congress enacted the Fees Act, the pertinent House and Senate Reports indicated that the appropriate standards for determining what constitutes a reasonable fee are those contained in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974).[81] Both the House and Senate reports expressed confidence that the application of those standards would "result[ ] in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys."[82]

That hope has not been realized. As early as 1977, one commentator noted that "[t]he only truly consistent thread that runs throughout federal court decisions on attorney's fees is their lack of consistency."[83] The situation is no better today. Some courts, finding the Johnson criteria too subjective and imprecise, have applied different approaches to computing a reasonable fee, most notably the lodestar approach, first articulated in Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973) (Lindy I), in which a reasonable hourly rate is multiplied by the number of hours reasonably spent to produce a lodestar figure, which may then be adjusted upward and downward depending on additional factors not applied in determining reasonable

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81/ S. Rep. at 5; H.R. Rep. at 8-9. The twelve Johnson factors, similar to those contained in the American Bar Association's Code of Professional Responsibility, are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the attorney's customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

82/ S. Rep. at 5; see also H.R. Rep. at 8-9.

83/ Berger, Court Awarded Attorney's Fees: What Is "Reasonable"?, 126 U. Pa. L. Rev. 281, 283-93 (1977).

hours and rates.[84] Still other courts have adopted a hybrid approach, combining the lodestar method with the Johnson criteria.[85] With different approaches being applied by different circuits and even by various courts within each circuit, parties litigating cases under § 1988 are subject to different approaches and, hence, different results. Courts disagree on what factors should be applied, how they should be applied, and even what they mean. Opposite holdings have been made on virtually every aspect of fee computation.[86] As a result, in cases decided between 1974 and 1979, hourly rates awarded to civil rights attorneys varied by 685 percent.[87]

As noted by one commentator, the adverse effects of this confusion are several:

> First, it inevitably results in unfairness to both attorneys and litigants. . . .
>
> A second consequence of the chaotic state of the law is an excessive amount of litigation concerning the proper fee amount. . . .[88]
>
> A third consequence of the existing state of the law is the arbitrary and haphazard allocation of legal resources . . .

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[84] See, e.g., Furtado v. Bishop, 635 F.2d 915, 920 (1st Cir. 1980); Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (Copeland III).

[85] See, e.g., Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087 (5th Cir. 1982); Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981); Avalon Cinema Corp. v. Thompson, 689 F.2d 137 (8th Cir. 1982).

[86] M. Derfner & A. Wolf, Court Awarded Attorney's Fees ¶ 16.01 (1983).

[87] Comment, Calculation of a Reasonable Award of Attorneys' Fees under the Attorneys' Fees Awards Act of 1976, 13 J. Mar. L. Rev. 331, 378 (1980).

[88] West's annotations to 42 U.S.C.A. § 1988, concerning guidelines and determinations of a "reasonable" fee, now fill 44 closely printed pages. 42 U.S.C.A. § 1988 (West 1981) at 221-58, (West Supp. 1983) at 29-39.

> Finally, the high degree of subjectivity involved in most fee decisions is unhealthy for both the legal profession and for the conduct of litigation . . .[89]

Although, "[i]deally, . . . litigants will settle the amount of a fee,"[90] this "ideal" cannot be realized where the parties have no way of estimating how much a court would award in a particular case.

Finally, the most significant adverse effect of the various methods presently employed to calculate the amount of fee awards under the Act is that the awards generated by the application of those methods cannot be characterized as "reasonable," in any conceivable sense of that term. The state of New York, for example, is currently appealing two cases in which the combined fee awards exceed $2 million. The cumulative effect of such awards on public treasuries is devastating. The state of Washington, for example, currently has pending against it over $8 million in attorney's fees claims. The state of Florida paid nearly $2.6 million in court-awarded attorney's fees during 1983 alone, and fee awards in recent years in that state have equalled roughly 80 percent of *all* substantive civil rights judgments against the state. Although the numbers are smaller, the state of Kansas has paid more in attorney's fees awards during the past three years than it has for all other settlements and judgments of any kind during that same period.

The escalating amount of fee awards has evoked harsh criticism from the judiciary, the press, and the public, as well as from many attorneys. In response to a survey of attorneys and federal judges, conducted by the Federal Judicial Center, 111 of 184 respondents agreed with the statement that "attorneys in class action suits [including civil rights actions] often reap 'windfall profits.'"[91] Judges also agreed, at a ratio of nearly three to one, that "fee abuses are a serious problem."[92] Concluding that "[t]he feeling that attorneys reap exorbitant fees appears to run deep," Professor Arthur Miller noted that "current attempts to reform the fee awards standards may be a logical response to a problem widely thought to exist by the judiciary, and many attorneys, as well as by the press and the public."[93]

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[89] Berger, *supra* at 283-93.

[90] *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1941 (1983).

[91] A. Miller. *Attorneys' Fees in Class Actions* (Federal Judicial Center 1980) at 300.

[92] *Id.* at 306.

Since the courts have thus been unable to arrive at consistent and workable standards for computing a "reasonable" fee under the Act, Congress should amend the statute to eliminate the chaos that is undermining its effective implementation. One partial solution that would eliminate much of the confusion and, at the same time, avoid blatantly excessive fees, would be for Congress to set a maximum hourly rate at which counsel may be compensated, as Congress was careful to do in the Equal Access to Justice Act, where the federal treasury was at risk.[94] In order to avoid disparate treatment for state and local treasuries, Congress should afford them the same protection. Other specific amendments are recommended later in this report.

> **Recommendation No. 6: The Congress should amend the Fees Act to provide that the prevailing party shall not be awarded fees in excess of $75 per hour.**

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[93] Id. at 301.

[94] 5 U.S.C. § 504(b) (1) (A); 28 U.S.C. § 2412(d) (2) (A) (setting a maximum hourly rate of $75). The Association is sensitive to inflation's effect on the adequacy of an hourly rate and suggests that this should be adjusted periodically.

Finding No. 7: Courts routinely make "bonus" awards or apply "multipliers" to the hourly rates set for prevailing counsel, resulting in grossly inflated awards constituting a "windfall" to prevailing counsel.

The awarding of "bonuses" over and above the "lodestar" amount (reasonable number of hours spent times reasonable hourly rate) has become commonplace under § 1988.[95] This growing practice has netted spectacular fee awards in many cases, far in excess of the reasonable value of the services rendered. For example, in Bolden v. Pennsylvania State Police, 491 F. Supp. 958 (E.D. Pa. 1980), an employment discrimination case, the court increased the basic fee by 50 percent, converting an $88,450 award into $132,675 (the total award, including $6,685 for law student services and $12,612.50 for preparation and litigation of the fee application, came to over $151,000). Although the court noted that the legal issues in the case were not particularly novel, it awarded the 50 percent bonus on account of the "excellent quality" of the legal work and the case's advancement of civil rights.[96] Similar results were reached in the New York case of Population Services International v. Carey, 476 F. Supp. 4 (S.D.N.Y. 1979), in which a bonus of $23,240 was added to a base award of $46,760, because the attorneys demonstrated a "high degree of skill and comprehensive research." Presumably counsel's research would have already been reflected in the number of hours billed, and the attorneys' skill would be reflected in their hourly rates, making a further bonus superfluous. In Vecchione v. Wohlgemuth, 481 F. Supp. 776 (E.D. Pa. 1979), the court doubled the lodestar amount to account for delay in payment, the quality of counsel's work, the case's furtherance of civil rights, and defendants' bad faith. The resulting award exceeded $207,000.[97]

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[95] Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L.J. 473 (1981).

[96] Id. at 965-66. Presumably the purpose of any fee award under § 1988 is the advancement of civil rights.

The concept of such bonuses or multipliers is nowhere mentioned in the Act. The legislative history, while citing a few cases in which minimal bonuses or multipliers were awarded,[98] falls far short of evincing clear Congressional support for the use of bonuses in computing fee awards. Rather, the concept of bonus awards is entirely a judicial creation, conceived in contexts that are entirely inapposite to the application of § 1988.

The concept originated in antitrust cases resulting in the creation of an equitable fund out of which both plaintiffs and their counsel recover.[99] In awarding fees in such cases, "the court exercises its equitable jurisdiction over the relationship between an attorney and his amorphous client."[100] The rationale for fee awards in such cases is one of quantum meruit — "the members of the [benefited] group should pay 'compensation as was reasonable' . . . to

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97/ *Id.* at 795-800. *See also, e.g., Stenson v. Blum*, No. 81-7385 (2d Cir. 1983), *cert. granted*, 103 S. Ct. 2426 (1983) (affirming 50 percent bonus); *Graves v. Barnes*, 700 F.2d 220 (5th Cir. 1983) (approving multiplier of 2); *Louisville Black Police Officers Organization, Inc. v. City of Louisville*, 700 F.2d 268 (6th Cir. 1983) (approving 33-1/3 percent enhancement); *Manhart v. City of Los Angeles*, 652 F.2d 904 (9th Cir. 1981); *vacated and remanded on other grounds*, 103 S. Ct. 2420 (1983) (approving increments of 75 and 30 percent); *Rajender v. University of Minnesota*, 546 F. Supp. 158 (D. Minn. 1982) (multiplier of 3); *Wells v. Hutchinson*, 499 F. Supp. 174 (E.D. Tex. 1980) (multiplier of 2); *West v. Redman*, 530 F. Supp. 546 (D. Del. 1982) (multiplier of 1.75).

98/ S. Rep. at 6. Those cases were cited as examples of the application of the proper criteria for determining a reasonable fee. Congress nowhere expressly endorsed or even mentioned the use of bonuses.

99/ *See, e.g., Lindy I*, 487 F.2d 161 (3rd Cir. 1973); *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3rd Cir. 1976) (*Lindy II*); *City of Detroit v. Grinnell Corp.*, 495 F. 2d 448 (2d Cir. 1974).

100/ *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3rd Cir. 1977).

the attorney representing their interests."[101] Under that theory, bonus awards make sense and are easily implemented, particularly where the case has created a large monetary fund out of which the award will be paid.

By contrast, fee awards under § 1988 are paid by the defendant in addition to any other judgment against him. Since the defendant is not the one who benefited from the action, the quantum meruit theory cannot be used to justify inflated awards in such cases. Nor can a bonus in such cases be characterized as part the of defendant's equitable "punishment" for legal wrongs against the plaintiffs, since, under § 1988, unlike in the antitrust cases, fees must be paid in addition to the compensatory relief on the merits, rather than out of it.[102]

An additional significant difference between fee awards in antitrust cases and those in § 1983 actions is that, in the latter, the fee award must be paid by a state or other public entity rather than by a private defendant. The state, unlike a private defendant, is a representative of the public interest; and the taxpayers who ultimately bear the burden of such awards are not guilty of any wrongdoing. Extra caution is therefore warranted in assessing the amount of the award so as not to disrupt state and local governments or unduly reduce the amount of money available for other public purposes. Since the rationales underlying bonus awards have no application in the context of § 1988, the adoption of this mechanism into the calculation of fees under § 1988 is not warranted.

Moreover, bonus awards are entirely inconsistent with the purposes of § 1988. First of all, bonuses are, by definition, "windfalls" to plaintiff's counsel, since bonuses are awarded in addition to "compensation of [plaintiffs'] legal expenses," which is all that Congress intended to provide.[103] As noted by one court, "multiplying the number of hours properly spent times a reasonable

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101/ City of Detroit v. Grinnell, supra at 469; Lindy I, supra at 165.

102/ See Berger, Court Awarded Attorneys Fees: What Is "Reasonable"?, 126 U. Pa. L. Rev. 281, 317-18 (1977); see also Hutto v. Finney, 437 U.S. 678, 695 (1978) (fee award under § 1988 not intended to "compensate the plaintiff for the injury that first brought him into court").

103/ See S. Rep. at 6 ("counsel . . . should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expneded on a matter' ").

hourly rate is sufficient to serve [the] goal" of attracting competent counsel.[104] Anything more than that is simply "unearned personal gain at the public expense"[105] or, in other words, "windfall."[106]

Second, even where some rationale is given for awarding a bonus, the *amount* of the bonus awarded is entirely arbitrary,[107] thus violating Congress's mandate that fee awards be "reasonable." Even courts that have endorsed the use of bonuses have commented on the subjectivity of arriving at a precise amount.[108] As noted by one court, the use of bonuses is an "open-ended device" that "is able to undo in a twinkling . . . all of the careful calculations" involved in setting the lodestar amount.[109] The arbitrary nature of such awards is exacerbated by the fact that a difference between a bonus, of, *e.g.*, 10 percent and one of 25 percent can result in a difference of hundreds of thousands of dollars in a protracted case.

The lack of consistency and predictability of bonus awards is directly contrary to Congress's purpose of ensuring uniformity and consistency in fee awards.[110] Furthermore, as a practical matter, the unpredictability of bonus awards makes it difficult for the parties to settle fee claims, since the prospect of bonus awards makes it impossible to estimate, with any degree of accuracy, the total amount

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104/ *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714, 716 (6th Cir. 1978).

105/ *Northcross v. Board of Education*, 611 F.2d 624, 638 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

106/ *Id.*; *see also* Berger, *supra* at 292, 317-18, 324 n. 167; Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651, 675.

107/ *See* Berger, *supra* at 290.

108/ *See, e.g.*, *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1382 (D.C. Cir. 1982) (amount of bonus "inherently imprecise"); *Foster v. Gloucester County Board of Chosen Freeholders*, 465 F. Supp. 293, 302 (D. N.J. 1978). *See also* M. Derfner & A. Wolf, *Court Awarded Attorney Fees* ¶ 16.05[1] (1983).

109/ *Swicker v. William Armstrong & Sons, Inc.*, 484 F. Supp. 762, 777 (E.D. Pa. 1980).

110/ *See* 122 Cong. Rec. 35,118, 35,122 (1976) (remarks of Rep. Sieberling); H.R. Rep. at 1.

of fees a court would be likely to award in a particular case.[111] Finally, the exorbitant fee awards that result from the use of bonuses certainly cannot be characterized as "reasonable" in amount.[112]

An examination of the justifications offered by courts in support of bonus awards reveals that those justifications are, in fact, fallacious and inconsistent with the overall purposes of the Act. The primary justification used to support bonus awards is that a bonus is necessary to account for the contingent nature of success, often termed the "risk of loss" or the "contingency factor." The roots of this concept can be found in the contingent fee agreements that often obtain betwen tort plaintiffs and their attorneys. In those circumstances, a contingent fee arrangment has "an economic rationale: it compensates plaintiff's lawyer for his services as an entrepreneur who bears the risks of litigation."[113] By taking a number of cases on a contingency basis, plaintiff's counsel can use the large fees recovered in successful cases to cover the losses he incurs in unsuccessful ones. Such arrangements thus have the purpose and effect of financing not only meritorious but also losing cases.[114]

However, such a purpose and effect are entirely inconsistent with those of Congress in enacting § 1988. Congress intended the Act to encourage and provide compensation only for *meritorious* cases,[115] certainly not for losing cases,[116] nor even for cases that have a reasonable chance of success but do not ultimately succeed.[117] In fact, Congress intended the Act to *deter* meritless suits.[118] As the Supreme Court said recently with respect to another fee statute, "One might well imagine the surprise of the legislators who voted for this section as an instrument for deterring meritless suits upon learning that instead it could be employed to fund such suits."[119]

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[111] For example, in *Brewster v. Dukakis*, 544 F. Supp. 1069 (D. Mass. 1982), plaintiffs' counsel sought fees of $1.2 million, including a 100% bonus. Following litigation of the fee claim, the district court awarded $386,204, including a 10% bonus. If bonuses were not available, the gulf between what plaintiffs were seeking and what defendants were willing to pay would have been much narrower and settlement much more likely.

[112] The size of such awards has brought harsh criticism from members of the public as well as the bench and bar. *See* Berger, *supra* at 292 and n. 55; *Alpine Pharmacy, Inc. v. Charles Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973) ("lucrative fees involved in recent class actions may evoke public acceptance of an Italian proverb, 'A lawsuit is a fruit tree planted in a lawyer's garden' ").

[113] Leubsdorf, *supra* at 480.

[114] *Copeland III*, 641 F.2d 880, 913 (D.C. Cir. 1980) (Wilkey, J. dissenting); Leubsdorf, *supra* at 474 ("The current theory of contingency bonuses implies that lawyers and clients should be made as willing to bring a feeble suit as a promising one"); *id.* at 491-92.

As pointed out by one commentator, ignoring the contingency factor is more consistent with Congressional intent: "Putting the lawyer to the risk in close cases helps weed out meritless claims . . . [and] provide[s] a desirable check on the . . . increase in court docket congestion."[120] Moreover, "[i]f [unsuccessful] litigation is to be subsidized, one may well ask why the subsidy should come from the defendant in another case."[121]

Contingency bonuses have the further untoward effect of rewarding, and hence encouraging, marginal claims to an even greater extent than clearly successful ones, since the amount of a contingency bonus varies inversely with the strength of plaintiff's claim.[122] Awarding bonuses on this basis is patently unfair to defendants, since such awards have the converse effect of forcing defendants to pay higher attorney's fees where they had a strong, but ultimately unsuccessful, defense than where violations of plaintiffs' rights were clear from the outset.[123] Such awards cannot serve to deter egregious civil rights violations by potential defendants, one of the subsidiary purposes of the Act,[124] since defendants are "penalized" only where it is unclear, prior to litigation, that their conduct is, in fact, illegal.[125]

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[115] 122 Cong. Rec. 35,118 (remarks of Rep. Sieberling) ("provide for . . . compensation . . . in meritorious cases"), 35,127 (remarks of Rep. Jordan) ("access to the system of justice to everyone . . . if he does, in fact, have a meritorious claim"), 35,128 (remarks of Rep. Sieberling) ("meritorious . . . deserving cases") (1976).

[116] 121 Cong. Rec. 26,806 (1975) (remarks of Sen. Tunney) ("act would do nothing to encourage frivolous litigation").

[117] *Furtado v. Bishop*, 84 F.R.D. 671, 677 (D. Mass. 1979) ("There must be an element of reason; the fee must not be such as to encourage the overpressing of marginal claims"), *rev'd*, 635 F.2d 915 (1st Cir. 1980); H.R. Rep. at 6-8.

[118] S. Rep. at 5; *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419-20 (1978).

[119] *Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274, n. 6 (1983).

[120] Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346, 375 (1980).

[121] Leubsdorf, *supra* at 488-89.

Finally, to the extent that contingency bonuses are intended to protect plaintiffs' counsel against the risk of nonpayment for their services, such bonuses are particularly inappropriate where plaintiffs are represented by a legal services organization that never receives payment from its clients and whose funding is not contingent on whether it prevails in individual cases. Such attorneys "cannot truly be said to have undertaken a risk of no remuneration."[126] As aptly stated by one commentator:

> If an organization is not permitted to charge its clients for its services . . . what does that organization risk in undertaking representation in one of the few types of cases which permit recovery of a fee? . . . [L]itigation which permits the collection of a fee by a federally funded legal

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[122] See, e.g., City of Detroit v. Grinnell Corp., supra at 471 ("[t]he greater the probability of success . . . the less this consideration should serve to amplify the basic . . . fee"); Prandini v. National Tea Co., supra at 1020.

[123] Leubsdorf, supra at 488-89.

[124] See, e.g., 122 Cong. Rec. 31,471 (1976) (statement of Sen. Scott) (Act will help eradicate discrimination); S. Rep. at 5 ("fee awards . . . secur[e] compliance with [civil rights] laws"); Copeland III, supra at 896.

[125] Rowe, supra at 656, 676 n. 115; Leubsdorf, supra at 490; Note, Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act, supra at 375; Hughes v. Repko, 578 F.2d 483, 491 (3rd Cir. 1978) (Garth, J., concurring).

[126] Vecchione v. Wohlgemuth, supra at 795.

services organization is actually the most lucrative type of litigation available to such organizations.[127]

Nor can contingency bonuses to legal services attorneys be justified on other grounds. Such bonuses cannot operate as an incentive for such groups to take more civil rights cases,[128] since an Internal Revenue Service ruling prohibits public interest law firms seeking tax-exempt status from "us[ing] the likelihood or probability of a fee award as a consideration in its selection of cases."[129] Futhermore, no additional incentive is needed to induce such organizations to take on such cases, since "[t]hese organizations exist to represent groups like the [plaintiff] class, with constitutional claims at the cutting edge of the law."[130] Nor should contingency bonuses be used as an indirect means of funding legal services organizations.[131] This Act was not intended for that general purpose,[132] but rather, only to finance *successful civil rights* cases, and there is no guarantee that bonuses received by legal services organizations will be used for that limited purpose. Thus, contingency bonuses to legal services attorneys, which serve none of the purposes of § 1988, must be characterized as impermissible windfalls to such organizations.

Other rationales, in addition to contingency, used by the courts to justify bonus awards include the complexity of the case and the quality of the services provided by plaintiffs' counsel. Since the complexity of the case increases the number of hours reasonably spent, and the quality of representation increases the reasonable hourly rate used to compute the lodestar amount, a bonus

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127/ Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Awards Act of 1976*, 13 J. Mar. L. Rev. 331, 369-70 and n. 189 (1980). *See also* Rowe, *supra* at 670.

128/ *Cf. Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

129/ Rev. Proc. 75-13, § 3, 1975-1 Cum. Bull. 662.

130/ *NYSARC v. Carey*, 711 F.2d 1136, 1154 (2d Cir. 1983).

131/ *Compare Copeland III*, *supra* at 899 *with id.* at 920 n. 32 (dissent).

132/ *See* Comment, *Calculation of a Reasonable Award of Attorneys' Fees*, *supra* at 362-63, 395.

supplementing the lodestar based on the factors necessarily constitutes a windfall, which should be disallowed.[133]

A bonus based on benefits obtained by the plaintiffs in the underlying case is also contrary to the purposes of the Act and unfair to the defendants. The basic fee award is designed to compensate plaintiffs to whatever extent that they prevail.[134] A party who fully prevails will receive compensation for all time reasonably spent in doing so and, accordingly, will receive a higher fee than one whose success is limited.[135] An additional bonus for success can only constitute a windfall. Moreover, the amount of a bonus based on results is likely to be arbitrary, particularly in nonmonetary cases where the results are difficult to translate into quantitative terms.[136] Finally, a court that has just ruled in plaintiff's favor might be inclined to reemphasize the importance of its ruling by rewarding plaintiff again, by way of a bonus, for his "outstanding" success. Such a bonus is unfair to defendants, since they have already "paid" for the results of their wrongdoing via the relief awarded against them on the merits. To "punish" them again by supplementing the fee award is contrary to the compensatory, nonpunitive purpose of the Act. Eliminating such bonuses would eliminate this subjective element of fee awards.[137]

For all of the reasons discussed above, bonus awards are inconsistent with the purposes of § 1988. Rather than merely compensate plaintiffs' counsel for their legal expenses in prosecuting a particular civil rights case, all that the Act intended, bonus awards constitute windfalls to plaintiffs' counsel, a result that Congress expressly intended to avoid. Therefore, Congress should amend the Act to prohibit the use of bonuses or multipliers in computing a fee award.

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[133] See Leubsdorf, supra at 487; Berger, supra at 317-38.

[134] See Hensley v. Eckerhart, 103 S. Ct. 1933, 1940 (1983).

[135] Id.

[136] Berger, supra at 316.

[137] Id. The purpose of this and other recommendations contained in this report is to make the process of awarding fees more objective. If these recommendations are implemented, courts would be liberated from engaging in this unnecessarily subjective process, since more claims for fees could be settled and those that reached the courts could be resolved by the application of objective and easily applied criteria.

Recommendation No. 7: The Congress should amend the Fees Act to prohibit the award of bonuses or multipliers in excess of compensation at a reasonable hourly rate for the number of hours reasonably spent by prevailing counsel.

Finding No. 8: In applying the Fees Act to prevailing parties represented by publicly-funded salaried attorneys, courts normally award fees based on hourly rates charged by private counsel, resulting in windfalls that substantially exceed the actual costs of the litigation.

In computing a "reasonable" attorney's fee for prevailing counsel, most courts have applied the market rates charged by private law firms to their fee-paying clients, even where the attorney seeking fees has not actually incurred the high costs ordinarily associated with private practice. For example, in a case now pending before the District Court of Massachusetts, a law professor employed by Harvard University at an annual salary of $70,000 and having minimal overhead expenses seeks to be compensated at the rate of $275 per hour (plus a bonus of 50 percent), a rate higher than those charged by even the most high-priced private firms in the area.[138]

In Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980), attorney's fees were awarded in four civil rights actions in which a non-profit legal aid society, partially funded by the state of Hawaii, represented the prevailing plaintiffs. The Ninth Circuit specifically rejected the argument that the legal aid society should be reimbursed only for its actual costs in litigating the case. Rather, the court concluded that the fee award should be based upon rates charged by private Honolulu attorneys. Similarly, in Stenson v. Blum, No. 81-7385 (2d Cir.), cert. granted, 103 S. Ct. 2426 (1983), the Second Circuit affirmed an award of fees to a publicly-funded legal services organization, at the rate of $95 to $105 per hour, "the rate[s] charged for similar work by [private] attorneys of like skill in the area." Those cases are not atypical.[139] However, as a few courts and commentators have recognized, awarding fees to legal services attorneys at "market" rates "constitute[s] a substantial windfall for the organizations involved" and therefore should not be permitted under § 1988.[140]

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[138] Grendel's Den v. Larkin, No. 77-3418-T (D. Mass.). See also Johnson v. Snyder, 470 F. Supp. 972 (N.D. Ohio 1979); Pugh v. Rainwater, 465 F. Supp 41 (S.D. Fla. 1979); Pennsylvania v. O'Neill, 431 F. Supp. 700 (E.D. Pa. 1977), aff'd mem. 573 F.2d 1301 (3rd Cir. 1978) (fees awarded to law professors at "market" rates).

[139] See also, e.g., Rodriguez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977), cert. denied, 436 U.S. 913 (1978); Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978).

A proper determination of what constitutes a "reasonable" hourly rate for legal services attorneys must begin with an examination of the language of the Act and its legislative history. The Act itself provides some guidance by authorizing the award of "a reasonable attorney's fee *as part of the costs*." The legislative history also repeatedly equates attorney's fees with the costs of litigation and emphasizes that the Act is intended to reimburse plaintiff's counsel for the "cost" of vindicating plaintiff's civil rights in court.[141]

The legislative history further indicates that the Act was intended primarily to encourage *private* attorneys to take civil rights cases,[142] although the House Report indicates, in a footnote, that "a prevailing party is entitled to counsel fees even if represented by an organization."[143] Thus, the legislative history falls far short of mandating that legal services attorneys be compensated at "market" rates. Moreover, even if Congressional endorsement of the market-rate system could be inferred from the legislative history, the escalating rates that have resulted from its application require a reexamination of that system in light of the overall purposes of § 1988.[144]

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[140] *NYSARC V. Carey*, 711 F.2d 1136 (2d Cir. 1983). *See also Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983); *Copeland III*, 641 F.2d 880 (D.C. Cir. 1980) (Wilkey, J., dissenting); *Copeland v. Marshall*, 594 F.2d 244 (D.C. Cir. 1978) (*Copeland I*); *Greenspan v. Automobile Club*, 536 F. Supp. 411 (E.D. Mich. 1982); *Glover v. Johnson*, 531 F. Supp. 1036, 1039-44 (E.D. Mich. 1982); *Page v. Preisser*, 468 F. Supp. 399 (S.D. Iowa 1979); *Alsager v. District Court*, 447 F. Supp. 572, 577-80 (S.D. Iowa 1977); Comment, *Calculation of a Reasonable Award of Attorney's Fees Under Attorney's Fees Awards Act of 1976*, 13 J. Mar. L. Rev. 331, 378-400 (1980).

[141] 122 Cong. Rec. 31,471 (remarks of Sen. Mathias), 31,472 (remarks of Sen. Kennedy), 35,118, 35,128 (remarks of Rep. Sieberling), 35,128 (remarks of Rep. Fish) (1976); H.R. Rep. at 1, 2-3, 6; S. Rep. at 2, 3, 6. *See also Alsager v. District Court*, *supra* at 577 ("Nothing . . . indicates that the purpose of the statute was other than *reimbursement* for costs and time spent."); *Page v. Preisser*, *supra* at 402-03.

[142] *See* H.R. Rep. at 2-3.

[143] H.R. Rep. at 8 n. 16.

What the legislative history does unequivocally demonstrate is Congress's intent that, however fees are computed under the Act and to whomever they are awarded, the amount of such fees should not be such as to constitute a windfall to prevailing counsel.[145] A close examination of the market-rate system of computing hourly rates for legal services attorneys reveals that it is contrary to that clear legislative intent.

As a few courts and commentators have recognized, assigning "market" rates to legal services attorneys presents difficult, if not insurmountable, problems. First of all, to state the obvious, there is no true "market" for the services of legal services attorneys, since they receive no fees from their clients. Particularly since minimum fee schedules may no longer be used,[146] rates vary widely within communities and even within individual law firms,[147] depending on factors having no necessary relationship with the value of the services rendered or the experience and skill of the attorneys involved, for example, the attorney's relationship with a particular client, what that client can afford to pay, the firm's overhead expenses, and how much profit the firm desires to make.[148] Since such factors are unrelated to the value of a legal services attorney's services in a particular case, assigning such an attorney a rate based on these factors is patently unreasonable and inconsistent with the legislative purpose of compensating civil rights attorneys only for the value of their services in a particular case.

More significant, in light of Congress's clear intent to avoid windfalls, is the fact that rates determined in this manner are likely to far exceed the legal service organizations' actual costs, since such rates are computed on the basis of the high overhead expenses and profit margins of private firms, which are not shared by legal services organizations.[149/] Any such excess is obviously a windfall to such organizations.[150/] Particularly where the party paying the fee is a state government, "the difference, if any, between the 'market value' fee and the 'compensation' fee would be better spent in remedying [the civil rights violation that gave rise to the action]."[151/]

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[144] See Copeland III, supra at 908, 910 (dissent) ("path of attorney's fees [under market-rate system] . . . is Up, Up, and Away ! . . . [S]pecific situations which arise in future cases will sometimes bring to light deficiencies in the general rules laid down in the past . . .").

[145] See H.R. Rep. at 9; S. Rep. at 6.

[146] Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[147] See Copeland III, supra at 910 n. 3, 924 (dissent) (" 'going hourly rate ' . . . is itself an artificial construct").

[148] Comment, Calculation of a Reasonable Award of Attorney's Fees, supra at 385; Copeland III, supra at 914, 924-25 (dissent).

Although the market-rate system may have been adopted in order to avoid treating legal services organizations any differently from private attorneys,[152/] that system, in effect, gives such publicly-funded counsel an unfair advantage over their private counterparts. As noted by one commentator:

> Requiring district courts to award identical gross fees to private and organizational counsel, notwithstanding the greater litigation expenses incurred by private counsel, would effectively award a higher return of profit to organizational counsel. Such a rule would lead a court to arbitrarily increase an otherwise reasonable award of attorney's fees simply because plaintiff's counsel happened to be employed by a legal services organization.[153/]

Such disparate treatment is not only unfair to the litigants on both sides of civil rights cases, but is also directly contrary to "the spirit of 'reasonableness' which is the heart of section 1988. . . . Legal services organizations, along with their counterparts in private

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149/ See NYSARC v. Carey, supra at 1150.

150/ Such a windfall cannot be justified as enabling legal services organizations to undertake other civil rights cases, cf. Palmigiano v. Garrahy, 616 F.2d 598, 602 (1st Cir.), cert. denied, 449 U.S. 839 (1980); Copeland III, supra at 899, since the Act was not intended to serve that purpose, however benevolent.

151/ Glover v. Johnson, supra at 1044.

152/ See, e.g., Palmigiano v. Garrahy, supra at 601.

153/ Comment, Calculation of a Reasonable Award of Attorney's Fees, supra at 398.

practice, are not entitled to anything more than a reasonable fee under section 1988."[154]

In order to avoid windfalls to legal services attorneys, a few lower courts have adopted an alternative method of computing hourly rates for legal services organizations, based on the actual litigation expenses of such organizations. Rather than arbitrarily assigning "market" rates to such attorneys, hourly rates are computed according to the hourly wages of the attorneys involved plus the percentage of the annual overhead of the organization attributable to the number of hours reasonably spent by the organization's attorneys on the case.[155]

This cost-based method has the advantages of more accurately reflecting the actual costs of vindicating a plaintiff's rights in a particular case, without compensating plaintiff's counsel for overhead and other expenses not actually incurred.[156] Such a system is consistent with the factors enumerated in *Johnson v. Georgia Highway Express* and endorsed by the Congress. An individual attorney's salary presumably reflects his relative skill and experience within the organization.[157] Other pertinent factors, such as the novelty and complexity of the case, would still be reflected in the court's consideration of the number of hours reasonably spent. Moreover, it must be remembered that the *Johnson* criteria were intended only as guidelines and *were not* meant to be applied so as "to make the prevailing counsel rich.[158]

In addition, a cost-based system is actually easier to administer than the more subjective and essentially arbitrary market-rate system.[159] The information needed to compute rates on this basis, i.e., attorneys' salaries and organizational overhead, is readily available, since legal services organizations are required under the Legal Services Corporation Act[160] to report such information as a condition to their receipt of federal funding. By contrast, under the market-rate system, prevailing counsel have the substantial burden of producing detailed and case-specific affidavits from community lawyers of similar experience and other expert testimony in order to establish an appropriate market rate for their services.[161] Furthermore, the objectivity of such information will facilitate settlement of fee claims by such organizations.

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[154] *Id.* at 395.

[155] *See NYSARC v. Carey, supra* at 1150-52; *Glover v. Johnson, supra* at 1044; *Alsager v. District Court, supra* at 579; *Page v. Preisser, supra* at 402.

[156] *See Page v. Preisser, supra* at 401.

[157] *Rodriguez v. Taylor, supra* at 1248.

[158] *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719 (5th Cir. 1974).

[159] *See Copeland III, supra* at 925-28 (dissent).

In sum, a cost-based system for determining reasonable hourly rates for legal services attorneys is consistent with the language and intent of the Act and is certainly preferable to the subjective and inflationary market-rate analysis currently applied by most courts. Under a cost-based system, legal services attorneys would receive full compensation for the cost of vindicating their clients' rights. They should not and cannot reasonably expect to receive more. Accordingly, Congress should amend the Act to provide that fee awards to salaried publicly-funded attorneys be computed on the basis of their actual costs.

> Recommendation No. 8: The Congress should amend the Fees Act to provide that, where the prevailing party is represented by a publicly-funded legal services organization, courts should compute a reasonable hourly rate for such counsel based on the actual costs of the litigation to the organization, including the proportion of the attorney's annual salary and of the organization's annual overhead attributable to the number of hours reasonably spent on the case.

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[160] 42 U.S.C. § 2996h (c) (1); 45 C.F.R. § 1602.

[161] *See* Berger, *supra* at 324; Comment, *Calculation of a Reasonable Award of Attorney's Fees*, *supra* at 385; *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982) ("Setting a prevailing hourly rate has proven more difficult than perhaps may have been contemplated.").

Finding No. 9: The Fees Act affects the process of legal dispute resolution in a way that is unfair to public defendants and that further burdens the courts by:

A. making it more desirable for plaintiffs to commence litigation, rather than settle disputes informally;

B. making it more advantageous for plaintiffs to continue litigation rather than settle where any meritorious claim is presented;

C. making it less desirable, once litigation is underway, for public defendants to alter challenged laws, administrative regulations, or official positions in any way that favors the plaintiffs;

D. making it less desirable for public defendants to litigate those close issues that should be litigated; and

E. making it difficult for plaintiffs and defendants to settle claims for attorney's fees.

Throughout this report, a recurring theme has been the adverse effect of various aspects of the Fees Act, as interpreted and applied by the courts, on the process of settling disputes. Because of the courts' liberal construction of "prevailing party" combined with their rejection of virtually all circumstances justifying the denial of fees, plaintiffs with any colorable claim are encouraged to commence suits, rather than attempt to resolve disputes informally, and to continue to litigate every claim, secure in the prospect of a substantial fee award as long as they prevail on any issue or succeed in obtaining some benefit after the commencement of litigation. Moreover, the longer the litigation continues, the higher the award the plaintiffs can expect to receive.

Conversely, defendants are discouraged from informally resolving disputes for fear that their actions will confer prevailing party status on the plaintiffs, virtually guaranteeing liability for fees. Public defendants are discouraged, however, from litigating cases where they have a strong defense, since in such cases, if plaintiffs ultimately prevail, defendants are forced to pay for both sides of the litigation plus a "contingency bonus" based on plaintiffs' high risk of loss.

Furthermore, because of the absence of uniform standards for calculating a "reasonable" fee award, plaintiffs and defendants have difficulty settling fee claims without litigation. Plaintiffs are further encouraged to litigate their claims for fees, since the cost of fee litigation is also charged to the defendants.

The net result of these incentives and disincentives is to deter plaintiffs from settling meritorious cases but to encourage defendants to settle close cases where they have a strong, but possibly unsuccessful, defense. Many of the foregoing recommendations, if adopted by the Congress, would partially alleviate these skewed and undesirable effects of the Act. However, in order to further encourage settlement, where appropriate, and thereby reduce unnecessary litigation, to the mutual benefit of all parties and the courts, additional reforms are necessary.

In order to encourage pre-litigation settlement, plaintiffs should be precluded from receiving fees where it can be shown that the litigation was commenced primarily for the purpose of obtaining attorney's fees. 162/ Such a denial would be warranted where, for example, plaintiffs made no attempt to resolve the dispute informally prior to litigation or filed suit despite defendants' willingness to settle the matter informally.

Once litigation is commenced, settlement could be encouraged by precluding an award of fees to plaintiffs who reject an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure and subsequently obtain a less favorable judgment from the court. Although some courts have construed Rule 68 to require the

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162/ Cf., e.g., 42 U.S.C. § 3612(c), precluding an award of fees where the lawsuit is "brought principally for the purpose of gaining attorney fees."

denial of attorney's fees in such circumstances,[163] other courts have disagreed.[164]

The denial of fees incurred after the rejection of a settlement offer that turns out to be more favorable than the relief eventually obtained from litigation would "work to further the legitimate concerns of judicial economy and efficiency without discouraging attorneys from pursuing civil rights litigation."[165]

> **Recommendation No. 9: The Congress should amend the Fees Act to provide that the court shall deny attorney's fees to a prevailing party, where it determines:**
>
> **A. that the lawsuit was brought principally for the purpose of obtaining attorney's fees; or**
>
> **B. that the prevailing party rejected an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure, or a cognate state rule of procedure, that was more favorable than the relief ultimately granted by the court, in which case no fees shall be awarded for the services rendered after the date of the offer.**

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[163] *See, e.g., Fulps v. City of Springfield*, 715 F.2d 1088, 1092 (6th Cir. 1983); *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 113 (N.D. Cal. 1979); *Jones v. Federated Department Stores, Inc.*, 527 F. Supp. 912, 920-21 (S.D. Ohio 1981); *Scheriff v. Beck*, 452 F. Supp. 1254, 1259 (D. Colo. 1978). *See also*, Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 899-90. A proposed amendment to Rule 68 is presently being considered, which would expressly provide that fees should be denied in such circumstances. 98 F.R.D. 361-67 (1983).

[164] *See, e.g., Chesny v. Marek*, 720 F.2d 474 (7th Cir. 1983); *Greenwood v. Stevenson*, 88 F.R.D. 225 (D. R.I. 1980).

[165] *Waters v. Heublein, Inc.*, *supra* at 114-15; *see also* Committee Note to Preliminary Draft of Proposed Amendment to Rule 68, 98 F.R.D. at 366 (1983).

CONCLUSION

The Association's recommendations are designed to further the original purposes of the Fees Act while eliminating some of the serious problems that have arisen from its application. In general terms, the major problem with the Act, as presently implemented by the courts, is the lack of uniform and easily applied standards of determining eligibility for fees and for computing the amount of a reasonable fee in particular cases. Absent such standards, state and local governments are faced not only with high and occasionally exorbitant fee awards, but also with the burden and expense of opposing excessive and unjustified claims for fees. Without clear standards, such opposition inevitably takes the form of complex and protracted litigation over fees, which further saps the resources of state and local governments, to the detriment of all parties, the courts, and ultimately, the public, the Act's intended beneficiaries. Legislative reform, along the lines recommended by the Association, is therefore urgently needed.

ABOUT THE ASSOCIATION

The National Association of Attorneys General was founded in 1907 for the purpose of fostering communication of legal developments and cooperative legal actions among the states' chief legal officers and their staff attorneys.

The Association staff compiles and disseminates information on legislative, agency, and judicial developments that have an impact on state legal affairs, and provides research and technical assistance to the offices of Attorneys General. The Association handles hundreds of information requests each month from the offices of Attorneys General, members of Congress, officials of the federal government, and the public. Information clearinghouses are maintained in ten substantive areas: antitrust, commerce, consumer protection, charitable trusts and solicitations, bankruptcy, criminal justice, corrections and institutional confinement, energy, environment, and medicaid fraud. In addition, the Association has been fortunate to obtain under the Intergovernmental Personnel Act (IPA), the services of two senior attorneys from the Department of Justice to assist state Attorneys General in the areas of management and information systems, and Supreme Court advocacy.

The Association operates an extensive continuing legal education program in numerous substantive law areas attended by Attorneys General, Assistant Attorneys General, and other state and local government officials.

The Association publishes five monthly reports of significant state and federal legal developments and legislative activities, as well as A-G Report, which focuses on the activities and responsibilities of Attorneys General. These publications are available to the bar and the public.

The full Association meets twice yearly, in June and in December, at which time it receives reports and recommendations from the committees and subcommittees, and thereafter debates and decides what action the Association shall take on litigation, legislation and policy issues. The autonomy of each Attorney General is carefully protected and the influence of the Attorneys General working together within the Association is targeted at those issues on which there is unanimous or nearly unanimous support.

The Association's staff works with numerous committees and subcommittees of the Congress in implementing the Association's policy positions by coordinating testimony of Attorneys General and providing such committees with the views of the Association on particular issues. In addition, we work closely with numerous state, local, and other associations on national issues of mutual concern.

Each spring, Attorneys General meet in Washington, D.C., with the President, Vice President, U.S. Attorney General, and chiefs of the antitrust, civil rights, criminal, and lands and natural resources divisions of the Department of Justice, the Chief Justice of the United States, House and Senate Judiciary Committee chairmen, and other key members of the Administration and Congress.

There are seven former Attorneys General who now serve in the Congress. Senator Jeff Bingaman (D-N.M.) was elected in November 1982 and joins Senators Slade Gorton (R-Wash.), Warren Rudman (R-N.H.), John Danforth (R-Mo.), Thomas Eagleton (D-Mo.), and Robert Stafford (R-Vt.), as well as Rep. Jim Jeffords (R-Vt.).

There are 10 Governors who are former Attorneys General: Governors Richard Bryan (D-Nev.), George Deukmejian (R-Calif.), Toney Anaya (D-N.M.), Mark White (D-Tex.), and Bill Clinton (D.-Ark.), William Allain (D-Miss.), William Brennan (R-Me.), Bruce Babbitt (D-Ariz.), Alan Olson (R-N.D.), and William Janklow (R-S.D.).

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